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A

COLLECTION

OF

TRACTS

RELATIVE TO THE

LAW OF ENGLAND,

FROM

78604

MANUSCRIPTS,

NOW FIRST EDITED

By FRANCIS HARGRAVE, ESQUIRE,

BARRISTER AT LAW.

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VOL. I.

Longis laboribus,—tamen dubiis, forſan adverſis.

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PREFACE.

THE chief object of the following collection is to call into general uſe a number of valuable manuſcripts on the law of England, which hitherto either have been confined to the ſmall circle of thoſe few who viſit public repoſitories of books, or have been deſtined to occupy private libraries in a ſtate nearly dormant except to the particular proprietors. I repreſent this as the *chief* object; becauſe the tracts, which I may occaſionally riſque from myſelf, will probably be too few in number, and from a conſciouſneſs of my own inferiority I fear too feeble in the execution, to deſerve much conſideration. If I ſucceed ſo far as to make a judicious ſelection of materials from the unpubliſhed labours of others, I ſhall hold myſelf ſufficiently fortunate to juſtify the preſent attempt; and for ſo much I am not wholly without hopes of meriting attention, being encouraged to indulge them by the courſe of my ſtudies, and by the generality of my acquaintance with the writings on the law of England. Nor is it ſurpriſing, that there ſhould be perſons, who, however unequal to the attainment of eminence by their own writings, may yet be qualified to form ſome judgment of the works of others, and to ſeparate ſuch of them as may be entitled to general notice from thoſe too mean to bear the public ſight. Genius to execute and judgment to diſcriminate are diſtinct qualities: the latter may exiſt where the former is an entire ſtranger.

The occaſion of my engagement in this undertaking was a preſent to me of two valuable manuſcripts of lord Hale, from a gentleman eminent for eloquence at the bar and other ſplendid

and valuable accompliſhments *; whoſe frame of mind is ſuch, that, where he feels a ſtrong regard, he cannot reſiſt the impulſe of marking it by ſome conſiderable ſacrifice to the uſe of the man he diſtinguiſhes by his friendſhip. One of theſe manuſcripts is the firſt and principal treatiſe in the preſent volume: the other, which is a diſſertation on the admiralty juriſdiction, will be hereafter introduced into the collection, if the undertaking ſhall be further purſued. Both are replete with knowledge ſo important to an Engliſh lawyer, that a profeſſional perſon appriſed of their contents could not avoid rating them highly. Yet this gentleman, the moment he perceived me ſtruck with their value, renounced his own poſſeſſion of them in my favor; and this kindneſs, which wanted not any aid from manner, was greatly enhanced by the moſt handſome and warm expreſſion of the motives inducing ſuch attention to me. Delighted with a preſent ſo uncommon, I immediately conſidered, how I could beſt evince my ſenſe of its value: and thence firſt aroſe the idea of the preſent undertaking; for which I thought the two manuſcripts thus conferred, with a proſpect of ſome few I was aware of from public libraries, a ſufficient ſtock to begin with.

Having reſolved upon the attempt, I announced it to the public by a full explanation of the nature of it; and I confeſs, that, from an unwiſe partiality to my own ideas of its utility, I was ſanguine in the expectation of conſiderable encouragement in execution of my deſign. But I was ſoon mortified into a conviction, that the undertaking did not carry attraction enough to intereſt the generality even of legal and profeſſional readers. The cauſe of this indifference, and whether it aroſe more from a diſtruſt of my ability and induſtry to conduct ſuch a publication, or from a doubt of there being a ſufficiency of materials to form it, I do not preſume to decide. But the effect upon my mind may be eaſily conceived. So cold a reception could not have any other tendency, than at leaſt to check the zeal with which the undertaking was planned, and to raiſe a doubt, whether ſeeming to be thus unacceptable it ought to be further proſecuted. Accordingly my feelings were ſo hurt, that I was upon the point of retreating. But a further conſideration determined me to complete the firſt volume of the propoſed collection, for which I had already made ſuch conſiderable preparation. However, as I am now inſtructed by experience to indulge little

* George Hardinge, eſq. ſolicitor-general to the queen.

hope

hope of exciting any conſiderable attention, there cannot be much room for new diſappointment.

It was no ſmall inducement to me ſo far to perſiſt in the publication, that my diſappointment in not being able to attract more general attention to the undertaking, was in ſome degree recompenſed by the countenance which it received from ſeveral reſpectable perſons, who condeſcended to give proof of their anxiety to contribute or point out materials for it. And here I think it right to explain, to whom my acknowledgements, excluſive of thoſe already made to the friend whoſe preſent of manuſcripts firſt cauſed my thinking of ſuch a collection, are in this reſpect more particularly due.—My excellent friend, the honorable John St. John, eſquire, to whom I am under great obligations on various accounts, and whoſe conſtancy of mind I have experienced for a courſe of years, evinced his extreme anxiety for the undertaking the moment it was announced, by a zeal for it, which to thoſe who underſtand what friendſhip is will want no apology, however unanſwerable this collection may prove to his too partial and ſanguine expectations.—By one gentleman of eſtabliſhed name in the literary world *, I was invited to examine the valuable collection of manuſcripts in the Inner Temple library: and in order to render my acceſs eaſy and agreeable, he and another worthy member of the ſame ſociety then treaſurer of it † politely attended to receive me in the library-room; each exhibiting ſuch a marked attention to my purſuit, as will always impreſs my mind with a ſenſe of obligation to them.—From another gentleman ‡, whoſe flowing talent of good-humoured wit renders him ſo valuable as a companion, and whoſe other faculties qualify him for diſtinction at the bar, I received the liberal tender of his whole ſtock of law manuſcripts, amongſt which were various unpubliſhed tracts by lord Hale.—A fourth gentleman ||, who, though ſtill in an early ſtage of life, has publiſhed enough to prove, both that he has acquired an unuſually extenſive information concern-

* The hon. Daines Barrington, eſq.

† Thomas Barton, eſq.

‡ Joſeph Jekyll, eſq. barriſter at law, great nephew of ſir Joſeph Jekyll, formerly maſter of the rolls.

|| Sir John Sinclair, baronet.

ing the finance and reſources of his country, and that his mind is actuated by a laudable zeal to uphold the national credit, honoured me with a ſhort manuſcript on offices and the election of officers in England according to the ancient law, from the famous mr. Pymme's papers, and written in 1641.—One of high rank amongſt the judges *, whoſe benevolence of heart intereſts him whenever he can do a kind or friendly action, anxiouſly endeavoured to ſecure for me the uſe of lord Hale's valuable collections on the rights and prerogatives of the crown: and with the ſame view a friend †, whoſe invaluable worth of mind endears him to all his connections, and whoſe extraordinary profeſſional knowledge is moſt juſtly advancing him rapidly at the chancery bar, interpoſed himſelf for me by various applications. My reſpected friends Mr. Henry Hoyle Oddie and Mr. Edmund Eſtcourt alſo interpoſed their good offices for the like obliging purpoſe. Notwithſtanding alſo that theſe attempts in my favor have not hitherto produced the whole of the deſired effect; yet they have been attended with an introduction of me to the acquaintance of the preſent worthy poſſeſſor ‡ of lord Hale's original manuſcripts, and alſo to the advantage of an occaſional acceſs to them.——The very learned and ingenious continuator of the new edition of Coke upon Littleton, from the firſt moment of his being appriſed of the preſent undertaking, has given very frequent proofs of his anxiety to furniſh materials for aſſiſting me in its proſecution. I am the more happy to acknowledge this unreſerved and liberal ſpirit of communication; becauſe it furniſhes me with a convenient opportunity of at the ſame time confeſſing, how great my obligation to this gentleman is, not only for ſpiritedly and diſintereſtedly enterprizing to complete what I found too arduous to bring to a proper concluſion; but for changing my reluctant deſertion of a favorite work in an unfiniſhed ſtate, into an important advantage to thoſe, who might otherwiſe have had cauſe to complain of injury. About two years ago, when I publiſhed my farewel addreſs to the public on conſigning that work to the care and protection of Mr. Butler, I avowed my confidence, that he would confer upon the new edition of the Coke upon Littleton much

* Lord chief baron Skynner.
† John Mitford, eſq.
‡ John Blagden Hale, eſq.

greater

greater value than could be reached by the moſt vigorous efforts from myſelf. What was then conjecture, founded on my high opinion of the character of this gentleman for talents, learning, and aſſiduity, is now become a real fact, by ſuch a ſucceſsful performance of his engagements, as even exceeds what I ſo unheſitatingly promiſed for him.—Further I have lately been ſurprized with an unſollicited communication of ſome papers in the hand-writing of lord Hale from a gentleman *, who is poſſeſſed of various manuſcripts formerly belonging to Robert Gibbon, eſq. one of his lordſhip's executors, and who has obligingly promiſed to make a more minute examination of them for my uſe. The principal paper thus ſent is a rough draught of the more finiſhed work which forms the firſt article in this volume, but with a different title; this firſt eſſay being ſtiled, "A NARRATIVE, legal and hiſtorical, touching the CUSTOMS."——To this liſt of obligations, I beg leave to add my ſtrong acknowledgements of the moſt obliging attentions from Henry Cowper, eſquire, aſſiſtant clerk of parliament; from my worthy friend Mr. Wallwyn Shepheard; from Thomas Aſtle, eſquire, keeper of the records at the Tower; from Thomas Chapman, eſquire, one of the ſecondaries of the court of exchequer; from the Reverend Mr. Harpur and the Reverend Mr. Aſcough at the Britiſh Muſeum; and from a learned though young barriſter of Gray's Inn, for whom I have a ſincere regard †.—Nor can I with juſtice withhold my ſenſe of the attentions, which the preſent undertaking has uniformly experienced from my near and highly eſteemed relation, the Reverend Mr. Smith Hargrave; who, from the commencement of it, has not merely aſſiſted me in conducting it with his advice and in other reſpects, but by the frequency of his perſuaſions has been a chief cauſe of at length urging me into the completion of the preſent volume. Without this mark of regard from the laſt-named gentleman, he had ſufficient claims upon me; as well in reſpect of my friendſhip for him perſonally, as from a ſeries of the moſt eſſential benefits conferred upon me in the very early part of my life, by his moſt excellent father, the deceaſed Major Hargrave; the remembrance of whoſe generous kindneſſes as an uncle, and of whoſe exemplary virtues as a ſoldier and man, will ever be dear to me.

* Mr. Beardſworth, of Lincoln Inn.
† John Baynes, eſquire.

I ſhall

I ſhall now proceed to offer ſome explanations and remarks, concerning the ſeveral tracts in this volume, in addition to the notice I have prefixed to each of them.

I.

The firſt piece in the volume contains a great abundance of important hiſtory and information relative to the CUSTOMS and various other titles of Engliſh law; on ſome of which ſubjects, at leaſt for the period of which the author treats, there is little at preſent in print, but looſe and deſultory matter. In this learned treatiſe the reader will find the ſame luminous order in the diſtribution of ſubjects, the ſame uncommonneſs of materials from curious records and manuſcripts, the ſame profoundneſs of remark, the ſame command of perſpicuous and forcible language, with the ſame guarded reſerve in offering opinions on great controverted points of law and the conſtitution, as characterize the legal writings of lord Hale heretofore publiſhed.

A ſenſible and pleaſant, but very prejudiced, writer †, whoſe life of his brother lord keeper North is full of intereſting anecdotes about the principal lawyers in the reign of Charles the ſecond, and on that and other accounts deſerves to be read by all ſtudents of the law, has anxiouſly labored to depreciate the character of lord Hale with poſterity. Into this invidious office he ſeems to have been precipitated by two very powerful influences over the human mind.—One was of an amiable kind, being an extreme affection for his brother the lord keeper, whoſe pretenſions to fame were beyond all doubt very high, but whom he wiſhed to lift into rivalſhip of character with lord Hale himſelf.—The other was an over-violent party-zeal, which ill ſuited with lord Hale's temperate line of conduct in the contentions between the crown and people. Mr. North was, what he deſcribes his brother the lord keeper to have been, a monarchiſt declared; in conſequence of which he was far too indulgent to exceſſes of royal authority. But lord Hale, though ſincerely hoſtile to all irregularities attempted againſt the crown, was at the ſame time ſo averſe to all encroachments under the ſanction of prerogative, that he could neither be awed nor won into any compliances having that tendency.—Being ſo ſwayed into a ſort of enmity towards lord Hale, the agreeable

† The Hon. Mr. Roger North.

biographer,

biographer, to whom I allude, exhibits a very injurious portrait of our moſt reverend judge; for ſuch a colouring is given to this great and ineſtimable man, that all his numerous good features are endeavoured to be ſpoiled or obſcured, and the few imperfections incident to him are multiplied and exaggerated. Thus we ſee his abundant piety degraded into the lowneſs of an exceſſive puritanical prejudice, his extreme humbleneſs of mind diſtorted into ſelf-conceit and vanity, his manly independent ſpirit as a judge ſunk into a mean and fearful courting of popularity. We ſee alſo his private weakneſſes commemorated with triumph; and his writings out of the line of the law, eſpecially his famous treatiſe on the origination of mankind, extravagantly ridiculed and deſpiſed: and as to his ſteady and uniform attachment to the real conſtitution of his country, it is confounded with the wild enthuſiaſm of thoſe, who blindly or corruptly aimed to extirpate the monarchy, and to eſtabliſh on its ruin the ſpecious tyranny of pretended republicaniſm, or to introduce the ſtill greater calamity of ſucceſſive anarchy. Nay, his moſt exemplary juſtice is not ſpared; in arraigning which, however, the honourable writer's prejudice betrays him into the moſt palpable inconſiſtency. For in many paſſages the reader is inſtructed to conſider lord Hale as an inveterate enemy to the crown, and as ſeldom impartial where the anti-court party was concerned in a cauſe. Yet in one place of the ſame book we are told, that "when he knew the law was for the "king, as well he might, being acquainted with all the re"cords of the courts to which men of the law are com"monly ſtrangers, he failed not to judge accordingly:" and in another place lord keeper North is made to ſay, that "whilſt lord Hale was chief baron of the exchequer, by "means of his great learning, even againſt his inclination, "he did the crown more juſtice in that court, than any "others in his place had done with all their good will and "leſs knowledge.

But notwithſtanding the ſhafts of invective thus induſtriouſly thrown at lord Hale, enough has eſcaped from their ſingular author concerning his lordſhip, to confirm the unqualified eulogiums heaped upon him both as a judge and a law-writer by his other cotemporaries, and ſo to convert the enemy of his high fame into the moſt convincing witneſs of its having been both fully poſſeſſed and ſuperabundantly deſerved.

deſerved. The paſſages, to be met with in juſtification of this remark, are occaſionally interſperſed; but being collected into one point of view muſt I think ſtrike the moſt inſenſible reader. It is part of the biographer's own repreſentation of lord Hale,—that "his opinions were by moſt lawyers "and others thought inconteſtable:"—that "the generality, "both gentle and ſimple, lawyers and laymen, idolized him "as if there never had been ſuch a miracle of juſtice ſince "Adam:"—that "his voice was oracular, and little leſs "than adored:"—that "he was allowed on all hands to be "the moſt profound lawyer of his time:"—that "even "lord keeper North revered him for his great learning in "the hiſtory of law and records of the Engliſh conſtitu-"tion:"—and further that "his collections and writings of "the law were a treaſure, and being publiſhed would have "been a monument of him beyond the power of marble." —To theſe teſtimonies from Mr. North himſelf ſhould be added the two paſſages I before appealed to; according to the obvious conſtruction of which it is manifeſtly confeſſed, not only that lord Hale was better qualified than any other judge to explore the rights of the crown, but that he always declared them when the law warranted it; and that thus, by the union of ſuperior knowledge with the ſevereſt impartiality, he had actually done more for the crown in that reſpect, than any of his predeceſſors the moſt devoted to the claims of regal prerogative with all their partiality had been able to effect.—All theſe paſſages, even in ſpite of the wiſhes of the writer, whoſe declared object was to leſſen the eſtimation of lord Hale, tend to fix the character given of him by his warmeſt admirers, or rather to elevate it above their deſcription, if in truth there was room for higher encomium than they have beſtowed. But what ſeems moſt remarkable in theſe teſtimonies for lord Hale from the foe to his fame is, that one part of the merits conceded to him obviates the chief objection made to his judicial character, to ſink which was clearly one great motive to the attack of him. The leading feature of lord Hale as a judge, which his cenſurer ſtrives to impreſs upon his readers as a genuine characteriſtic, moſt certainly imports, that, in the exerciſe of his judicial function, he was greatly and continually under the dominion of an obſtinate prejudice againſt the court, and of a proportionable predilection

predilection for the oppoſite party. But ſurely this impreſſion cannot have long currency with any conſiderate reader; when the ſame perſon in effect tells us, that where the crown was concerned lord Hale ſought to find what the law was, and having found declared it accordingly. As I conſtrue theſe two repreſentations, it is imputing the groſſeſt partiality in principle, and the pureſt impartiality in practice, to the ſame judge, almoſt in the ſame breath; and if this inconſiſtency be fairly chargeable, the deſtruction of character intended may be ſaid to operate like a ſtrong poiſon, accidentally ſo combined with and unqualified by antidotes, as to become a moſt ſalutary medicine.

Upon this view of the character of lord Hale, as it may be deduced from the writings of the only detractor from his fame I have met with in print, I preſume to hope, that I ſhall ſtand excuſed for the avidity with which I now appear as the editor of a part of his hitherto unpubliſhed legal collections. At the ſame time I wiſh it to be underſtood, that in adverting ſo much to his reputation I had ſomething of more importance at heart, than merely to found an apology for myſelf, or to increaſe the attention of the public to any part of the collection now offered to them. I acknowledge, that I am alſo actuated by an anxiety to preſerve the fame of lord Hale inviolate.——Abſtractedly conſidered he commands ſo much reſpect, that it ſeems ſcarce conſiſtent with an ordinary portion of ſenſibility to be indifferent, whether the high eſtimation of ſuch a perſon ſhall continue undiminiſhed, or ſhall for a moment be ſhaken by the invectives of any writer, however deſerving of attention on any other account.—Beſides, our gratitude ought to intereſt us in behalf of lord Hale. Men, who ſuſtain high judicial ſituations with tranſcendent abilities and perfect integrity, have the ſtrongeſt claims upon the gratitude, as well of poſterity, as of the times in which they live; becauſe the fruits from their adminiſtration of juſtice are of a permanent kind, the benefit inſenſibly paſſing through the firſt partakers, and ſo becoming diffuſed for the uſe of ſucceeding generations. In the inſtance of lord Hale, this claim upon our gratitude is enhanced by another ſervice of almoſt equal weight. So inceſſant and ſevere are the labours of the mind incident to an effectual diſcharge of the judicial function, that few of

our

our judges have attempted in any degree to illumine the intricate ſcience of law by the ſplendor of their writings; the moſt eminent and induſtrious of them having ſeldom contributed any thing, except mere notes of the caſes adjudged in their own times. But lord Hale, not content with his acknowledged pre-eminence as a judge, performed a double ſervice; for he added to the fatigues which official duty exacted, a voluntary ſacrifice of his hours of retirement to the toil of writing, for the noble and generous purpoſe of methodizing and illuſtrating the laws of his country. In purſuit of this object he ſubmitted to the moſt difficult and painful reſearches; drawing his materials more from the ſecret and difficult receſſes of ancient records and other rare manuſcripts, than from printed books. So regardleſs too was he of expence, in this mode of obtaining lights for the darker ſubjects of law, that, notwithſtanding the narrowneſs of his fortune * and the largeneſs of his family, thoſe manuſcripts alone,

* The ſmallneſs of his fortune at the Reſtoration, when he was above 50 years of age, and had derived the benefit of a long and ſucceſsful practice, is noticed in the following imperfect paper; which contains lord Hale's reaſons for labouring to decline the high judicial office then intended for him. This fragment explains the ſtate of his mind at that critical period of our hiſtory ſo fully, that I preſume it cannot but be acceptable to the curious reader.

" Reaſons, why I deſire to be ſpared from any place of public imployment.

" I. Becauſe the ſmallneſs of my eſtate, the greatneſs of my charge, and ſome " debts, make me unable to bear it with that decency which becomes it, unleſs " I ſhould ruin myſelf and family. My eſtate not above 500 l. per ann. ſix " children unprovided for, and a debt of 1000 l. lying upon me.—And beſides " this, of all things it is moſt unſeemly for a judge to be neceſſitous. Private " condition makes that eaſier to be born and leſs to be obſerved, which a public " imployment makes poor and ridiculous.—And beſides this, it will neceſſarily lift " up the minds of my children above their fortunes, which will be my grief and " their ruin.

" II. I am not able ſo well to endure travel and pains as formerly. My preſent " conſtitution of body requires now ſome eaſe and relaxation.

" III. I have formerly ſerved in public imployment under a new odious intereſt, " which by them that underſtand not, or obſerve not, or will willingly upon their " own paſſions or intereſt miſtake my reaſons for it, may be objected even in my " very practice of judicature, which is fit to be preſerved without the leaſt bleміſh or diſrepute in the perſon that exercizeth it.

" IV. The preſent conjuncture and unſettlement of affairs, eſpecially relating " to adminiſtration of juſtice, is ſuch, the various intereſts animoſities and " queſtions ſo many, the preſent rule ſo uncertain, and the difficulties ſo great, " that a man cannot, without loſs of himſelf or reputation, or great diſobligа- " tions, exercize the imployment of a judge, whoſe carriage will be ſtrictly ob-

" ſerved,

alone, which at his death he gave to Lincoln's Inn, cost him about fifteen hundred pounds; a sum which, as he left an estate not quite 900 l. a-year, was according to the probable price of lands at his death equal to a very considerable part of his whole fortune. In consequence of his thus devoting himself to the public good, we of the profession of the law in the present time may continually profit by the study of so much of his law-writings, as have been already published; and unless I deceive myself by an imaginary value, we may also expect like important aids from his unpublished collections, as they shall gradully appear in print. Nor is it a small part of the benefits already derived to us from lord Hale, that a late distinguished commentator on our laws was so greatly assisted in forming the plan of his elegant institutions. As may be collected from what himself candidly avows, the

"served, easily misrepresented, and severely censured, according to variety of "interest. And I have still observed, that almost in all times, especially upon "changes, judges have been ever exposed to the calumny and petulancy of every "discontented or busy spirit.

"V. I have two infirmities, that make me unfit for that imployment.—— "1. An aversation to the pomp and grandeur necessarily incident to that imploy- "ment.——2. Too much pity, clemency, and tenderness, in cases of life, which "may prove an unserviceable temper for bustling * * * * *
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"VI. * * * * * *
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"VII. I shall lose the weight of my integrity and honesty by accepting a place "of honour or profit, as if all my former counsels and appearances were but a de- "sign to raise myself.

"VIII. The very engagement in a public imployment carries a prejudice to "whatsoever shall be said or done to the advantage of that party that raised a man, "as if it were the service due to his promotion. And so, though the thing be "never so just, it shall carry no weight, but a suspicion of design or partiality.

"IX. I am sure, in the condition of a private man declining preferment, my "weight will be three to one over what it will be in a place of judicature.

"X. I am able in my present station to serve my king and country, my friend, "myself and family, by my advice and counsel.

"XI. I have of late time declined the study of the law, and principally applied "myself to other studies, now more easy, grateful, and seasonable for me.

"XII. I have had the perusal of most of the considerable titles and questions "in law, that are now on foot in England, or that are likely to grow into con- "troversy within a short time. And it is not so fit for me, that am preingaged "in

the outline of that fine work is in great meaſure a ſuperſtructure raiſed on the foundation of lord Hale's previous digeſt and diſtribution of the ſubject, in that ſhort but wonderful emanation of his mind, the "ANALYSIS of the CIVIL PART of our LAW;" which is of ſo peculiar a value, that even the labours of a Blackſtone in the ſame track have not ſufficed to ſuperſede its uſe. So great indeed is the confidence of profeſſional men in the aſſiſtance furniſhed to us by lawyers ſuch as lord Hale, that, inſtead of going to the fountain-head for new ſupplies, we of the preſent age place our chief reſource in the materials to be found in their works, and rarely attempt any thing beyond an application of the knowledge they contain. Thus, therefore, ſubſiſting as it were on the ſtock of learning treaſured by lord Hale, lord Coke, and a few others of the laſt century, ſurely the leaſt return we can in juſtice make to ſuch great benefactors is, to give their characters all poſſible protection againſt the outrages of invidious calumny.—There is another conſideration, which ought to render us, as friends and lovers of our country, very anxious to guard lord Hale's character from unjuſt reproach. The public at large ever have a ſtrong intereſt in the fame of great and diſtinguiſhed citizens; and never perhaps was that intereſt of more value, than it is in the preſent æra. High eſtimation of character is one of the brighteſt and deareſt rewards,

* "in opinion, to have theſe caſes fall under my judgment as a judge, as I needs "muſt either upon trials or judgment.

"If it be objected, that it will look as a ſign of the diſpleaſure of the king "againſt me, or of a diſſerviceable mind in me towards the king, if I ſhould "either be paſt over or decline a preferment in this kind; I anſwer, that neither "can reaſonably be ſuppoſed.

"1. In reſpect of my preſent condition as ſerving in the houſe of commons, "which excuſeth the ſuppoſition of either.

"2. His majeſty's good opinion of my fidelity may be eaſily manifeſted; and "my fidelity and ſervice to him will be ſufficiently teſtified by my carriage "and profeſſions.

"But if after all this there muſt be a neceſſity of undertaking an imployment, "I deſire,

"1. It may be in ſuch a court and way, as may be moſt ſuitable to my courſe "of ſtudies and education.

"2. That it may be the loweſt place that may be, that I may avoid envy. "One of his majeſty's counſel in ordinary, or at moſt the place of a puiſne "judge in the common pleas would ſuit me beſt."

Here it is obſerved in the manuſcript book, from which what precedes is copied, "that *deſunt multa*, the paper being torn."

rewards, which can be beſtowed upon us in our ſublunary ſtation; conſequently it is one of the moſt powerful incentives to great and good actions. In proportion, then, as this reward is effectually ſecured to thoſe who earn it by their virtuous toils, we may count upon a greater or leſs number of men to preſerve the ſtate from the wide-ſpreading degeneracy of the times, and other numerous perils by which we have been long threatened. But if the temple of honour is to be profaned, by diſplacing ſuch an aſſemblage of public and private virtues as lord Hale from the high ſituation he even before his death filled there, what mortal, however capable of the moſt eſſential ſervices to the ſtate, can preſume to hope for a permanent poſſeſſion of the fame, which ought to reſult from them; and when all hope of a ſolid fame ſhall become extinguiſhed, how can we expect from the infirmity of human nature, eſpecially in ſuch an age as the preſent one, any thing like efforts by great actions to obtain ſuch high reward?—In a further point of view alſo, ſucceſsful detraction of great characters tends to produce a public miſchief; for if it ſhall be found poſſible by miſrepreſentation to deſtroy all eſteem for ſuch exemplary perſons as lord Hale, it may diſſeminate an idea, amongſt all claſſes of ſociety, that the perfection of virtue attributed to the diſtinguiſhed citizens of former times is a mere imagination; and ſhould this perſuaſion circulate, we cannot but expect a rapid increaſe in the ſtrides towards national depravity. Much practical virtue muſt not be looked for, where the exiſtence of any is generally diſbelieved.

Here then I ſhall leave the character of lord Hale with a confidence, that liberal-minded readers will eaſily forgive me; though by ſo fully conſidering the only reproach ever attempted to be fixed upon him, I may have paſſed the ſtrict bounds of a preface to a volume, in which his lordſhip's writings are only to form a part of the collection.

In reſpect to the particular contents of the treatiſe, which has led to this digreſſion about lord Hale, they ſo fully appear from his own titles to the books and chapters, as almoſt to preclude every explanation from me. So happily indeed are the diviſions of the chapters of the work expreſſed, that, if he had not given any thing more, it would have ſo opened the mind of every perſon adequate and accuſtomed

cuſtomed to legal ſubjects, as to be a moſt profitable inſtruction. The titles of the chapters are explicit in teaching the order and manner, in which the ſubject ought to be inveſtigated and conſidered; and therefore had not the author executed his own excellent plan, they would have been a fine outline for ſome future ſtudious and learned man to fill up, by gathering and digeſting the requiſite materials.

However, I have ſomething to offer, not only concerning the general deſign of the treatiſe, but alſo concerning ſome few ſubjects of conſequence which are conſidered in the courſe of it, or affected by its contents.

The main and leading purpoſe of the author certainly was to give a legal hiſtory of the cuſtoms, from their earlieſt infancy, to the Reſtoration, and for ſome few years after. The firſt and ſecond parts of the treatiſe, which concern ſome collateral ſubjects having affinity to the ports, and alſo the ports themſelves, muſt therefore be conſidered merely as preliminary and introductive; though from the profound learning with which they are executed, they furniſh information frequently new and almoſt always important. In the third part, after purſuing his ſubject hiſtorically through every reign of the previous period, he ſhews the great ſettlement of the cuſtoms, effected by the act of tonnage and poundage paſſed immediately on the Reſtoration: and what is very material to the preſent times, as that act is ſtill the chief foundation of the revenue from the cuſtoms, the duties impoſed by ſubſequent ſtatutes being ever in ſome degree referable to it, he adds ſeveral chapters on payment of the duties, in the courſe of which we ſee, in the moſt authentic and authoritative form, what were the adjudications of the court of exchequer on the collection of this branch of public revenue, whilſt lord Hale preſided as chief baron.—What induced lord Hale to labour ſo profoundly and anxiouſly on the ſubject of the cuſtoms, more eſpecially in the early and dark periods, I do not obſerve to be any where particularly explained by himſelf. But when it is recollected, that in the younger part of his life, the claims of the crown to tax the ports by prerogative had been ſanctioned even by the judges *, and that this

* This will appear by the judgment of the court of exchequer given in the early part of our firſt James's reign, in the great conſtitutional cauſe between the crown

this dangerous pretenſion did not receive its final death-wound, till it was in expreſs terms declared contrary to law by the firſt act

crown and mr. Richard Bates a merchant of London, which is uſually called the CASE of IMPOSITIONS. In the eleventh volume of the State Trials, almoſt every thing relative to that famous caſe is induſtriouſly brought together in one point of view by the preſent editor. The collection there made begins with the printed report of the caſe, as argued before and determined by the barons of the exchequer in 1607, from Lane's exchequer caſes. This is followed by ſir John Davis's argument in favour of a prerogative to fix the ports from a manuſcript firſt printed in mr. Carte's Hiſtory of England. Next are given ſir Francis Bacon's ſpeech in parliament in 1610 for the ſame prerogative, with two moſt eloquent and elaborate ſpeeches of mr. Yelverton and mr. Hakewill againſt it. Then there follows the petition of grievances addreſſed by the houſe of commons to king James in the ſame year, a principal object of which was to condemn impoſitions at the ports by regal authority, as an infringement of one of the moſt fundamental and ſacred points of our conſtitution. After this there is inſerted the ſpeech of ſir Francis Bacon to the king on preſenting this petition of grievances. To the whole of theſe collections relative to the CASE of IMPOSITIONS, the preſent editor has prefixed, not only a reference to moſt of the printed books which contain any thing on this important controverſy between the rights of parliament and the claims of the crown; but a general review of the various attempts, made between the acceſſion of James the firſt to the crown of England and the commencement of the civil wars in the reign of his immediate ſucceſſor, to eſtabliſh a ſyſtem of *prerogative taxation*; with a ſhort explanation, how each mode of attack upon the conſtitution in that reſpect was ſucceſſively combated, till a complete and deciſive victory was gained over the whole plan thus projected in favour of an illegal extenſion of the royal prerogative. This note of the preſent editor on Bates's caſe being ſo connected with the chief ſubject of the firſt and principal tract in this volume; he therefore takes the liberty of here giving, with ſome ſmall alterations and additions, the following extract from it:

"This famous CASE of IMPOSITIONS involved in it a conſtitutional queſtion of "the firſt magnitude; mr. Bates the defendant having been proſecuted for refuſing "to pay a duty on foreign currants impoſed by a mere act of the crown. The at- "tempt, to enforce a ſubmiſſion to this duty by legal proceſs, was certainly a "principal and early part of that raſh and unwarrantable ſcheme to eſtabliſh in the "crown a right of taxing the ſubject, which diſturbed the reigns of the two firſt "princes of the *Stuart* line. James the firſt claimed the right of impoſing duties "on imported and exported merchandize by prerogative. His ſon and immediate "ſucceſſor, the unfortunate Charles, not only perſiſted in claim, but added to it "the equally formidable pretenſion of ſhip-money. Realized, theſe claims, with "loans, benevolences, diſpenſations, monopolies, and the other ſubſidiary branches "of the ſame extravagant deſign, would have comprized nearly a complete ſyſtem "of extra-parliamentary taxation; for impoſition at the ports was calculated to "ſerve the purpoſe *externally*, ſhip-money to operate *internally*. Had they been "acquieſced in, parliaments would have become unneceſſary aſſemblies: the "mildneſs of a limited monarchy would gradually have degenerated into the "harſhneſs of an abſolute one: a legal government would have been corrupted "into a tyranny. To the great diſgrace of the profeſſion of the law, ſome, who "in other reſpects were its brighteſt ornaments, gave their aids to ſuch attempts "againſt the rights of parliament. We make the acknowledgment with concern; "but it is a truth, which neither can nor ought to be concealed. The great lumi- "nary of ſcience, lord Bacon, exerciſed his eloquence to reconcile parliament to "impoſitions by prerogative. Sir John Davis, ſo juſtly admired for his writings "about Ireland and his Reports, compoſed a treatiſe to prove the right of the "crown. Both diſplayed the greatneſs of their talents on the occaſion, though "they managed the argument in different ways; the former ſpeciouſly profeſſing

"to

act of tonnage and poundage paſſed by the long parliament in the reign of the firſt Charles, and this declaration was repeated

" to claim the prerogative in queſtion from and to limit it by law; the latter " boldly adventuring to exalt the ſame prerogative above law, and deſcribing it " to be like another Sampſon, too ſtrong to be bound. 2. Bac. 4to. ed. 1778. " p. 223. Dav. on Impoſit. 131. Even the judges deigned to be inſtruments for " ſubjugating their country to an illegal taxation. Though it was incontroverti- " ble, that, by the fundamental policy of our conſtitution, the legiſlature conſiſted " of king lords and commons in parliament aſſembled; though the judges had be- " fore them the ſtrong teſtimony of lord chancellor Forteſcue in his famous book " De Laudibus Legum Angliæ, that even in the reigns of Henry the ſixth " and Edward the fourth the Engliſh monarchy ſtood diſtinguiſhed as *limited* from " the French monarchy as *abſolute*, notwithſtanding their original reſemblance to " each other; though this noble-minded lord chancellor had inſtructed the *heir* " *apparent to the crown*, that one of the moſt eſſential differences between the " two monarchies aroſe from the prevalence of the king's deſpotiſm of taxation in " France, and from parliament's having that power in England; though they " could not but know, that from the moment the king ſhould ſucceed in attracting " from parliament the commanding power of taxation, parliament muſt have pe- " riſhed; though the ſtatute-book was full of legiſlative declarations againſt taxes " without conſent in parliament, and theſe declarations reached back almoſt as " far as there is any teſtimony from parliamentary records; though not ſo much " as one clear recognition of the claim could be found in the records of juſtice:— " notwithſtanding all this, the court of exchequer in Bates's caſe unanimouſly " gave judgment for impoſitions by prerogative on imports and exports. In mr. " Hampden's caſe alſo, notwithſtanding that ſome very recent admonitions and " warnings of duty had intervened, the judges of Weſtminſter-hall, *two only ex-* " *cepted*, joined to give the ſanction of a judicial opinion to ſhip-money. Nor " were monopolies loans and benevolences wholly uncountenanced by the courts of " juſtice. But, during this criſis, the two houſes of parliament did not forget their " duty. They purſued the ſeveral devices for illegal taxation, till all were hunted " down, and had yielded to the tide of law and conſtitution. In 1610, the houſe of " commons, alarmed by the judgment in Bates's caſe, and having ranſacked the re- " cords of the kingdom for proofs, they then formally debated the right of the crown " to impoſe on merchandize at the ports; and at length, by a petition to the king " complained of ſuch impoſitions as one of the moſt dangerous grievances; and this " in the ſubſequent parliaments was followed with frequent remonſtrances of the " like kind. In 1623, monopolies were curbed and regulated by ſtatute. In 1627, " gifts loans and benevolences were pointedly declared contrary to law by the peti- " tion of right, with general words to comprehend all ſorts of taxes and charges out " of parliament. In 1640, the legiſlature cruſhed ſhip-money almoſt in its birth, " by declaring the judgment for it contrary to law and vacating the record. In the " ſame year the final blow was given to taxation by prerogative; an act for tonnage " and poundage being paſſed, with a declaration in it againſt the king's claim to " impoſe ſuch duties.—Thus the victory over all the ſeveral inventions to tax the " ſubject by prerogative became complete: before the civil wars broke out, before " the conteſt with the crown degenerated from reſiſtance of uſurped powers into an " invaſion of juſt claims. Fortunately too, when the country emerged from the " anarchy and miſery of the ſcene which followed, the extravagance of joy did not " extinguiſh a due remembrance of the conſtitution. One of the firſt acts, after the " reſtoration, was a grant of tonnage and poundage, with words, which renewed a " part of the former declarations againſt taxing by prerogative; for it anxiouſly " recited, that *no rates can be impoſed on merchandize imported or exported by ſub-* " *jects or aliens but by conſent in parliament.* 12 Cha. 2. c. 4. ſect. 6.—It was once " our intention to have traced more fully the hiſtory of the long conteſt about taxes " out of parliament, from the acceſſion of the houſe of Stuart, till it was finally " decided

repeated in a parliamentary grant of the like kind after the Reſtoration; it is not an improbable conjecture, that lord Hale was induced to engage in ſo laborious

" decided againſt the crown in 1641; our plan being to have minutely and diſtinctly " ſtated the proceedings on each ſpecies of device to elude the conſtitution, and to " have given a general view of the arguments by which each was ſuſtained or re- " pelled. But though we had already made many reſearches, and collected many " materials on the ſubject; it was found impoſſible to do juſtice to it, without more " time than was conſiſtent with preſent convenience to allow. We therefore " reſerve the detail of the ſubject for ſome future occaſion. As to the attempts at " extra-parliamentary taxation in the previous period, they are inveſtigated in ſome " of the pieces which are now preſented to the reader."

Slight and general as the foregoing review of the ſtruggles for a prerogative of taxation is, it may have ſome uſe; becauſe it may ſerve to prepare the mind of the reader for and aſſiſt him in facilitating a deep ſtudy of the ſubject. But ſo great a point of the conſtitution ought to have a full and particular hiſtory, both for the time antecedent to the acceſſion of James the firſt as king of England and for the ſubſequent period; and as appears from the extract before made, ſuch a hiſtory has been long meditated by the now editor, from a perſuaſion, that it would not only demonſtrate the antiquity of our preſent conſtitution, but throw abundance of light upon various collateral matters relative to the *jura coronæ*, and ſo contribute to laying the foundation for a more ample and digeſted account of that vaſt and high title of our law, than has hitherto appeared in print.

Though this annotation is already ſo long, the editor cannot reſiſt the temptation of lengthening it, by ſome additional remarks on the raſhneſs of the meaſures taken by James the firſt and his immediate ſucceſſor, to wreſt from parliament the power of taxing the ſubject, and to fix it in the crown ſingly.

So far as reſpected the general point of taxing by prerogative, it ſeems to have been the ſtrongeſt of all caſes againſt the crown. There were ſuch apparent bars to the claim of prerogative in this reſpect, that it ſeems ſurprizing, how lawyers of eminence could ſubmit to the drudgery of being advocates in ſuch a cauſe. If king James had found himſelf ſtrong enough by military force to change the form of our government, and to ſubſtitute for it a deſpotic ſovereignty in the crown, however monſtrous ſuch an abuſe of his public truſt would have been, its meaning could not have been doubted; for it would have amounted to ſaying, " I confeſs the preſent conſtitution is otherwiſe, but I chuſe " to make a new one; *ſic volo, ſic jubeo*, " *ſtet pro ratione voluntas*. However unjuſtifiable it may be, I will have it ſo." But whatſoever the inclinations of James the firſt and his ſon the unfortunate Charles might be, either they were not in a condition to riſk being thus explicit, or had not the courage to try their force: and this being ſo, the difficulty of accompliſhing their deſign againſt the conſtitution became great indeed; for the great lines of argument both on the principle and fact of the conſtitution were in the teeth of prerogative taxation,—whether the attempt had been made in the large and ſhort way, by at once inſiſting, that the power was inherent in the crown and exerciſeable without the two houſes of parliament,—or, as the experiment was tried, in the detail, by taking advantages of all the irregular practices of former times, and by ſtraining certain allowed rights and prerogatives into abuſe, and ſo giving to them the colour and pretext of a right of a far higher claſs. It could not be denied, that the legiſlative power was by our conſtitution in the king lords and commons. To argue then the next moment, that, notwithſtanding this, there was latent in the crown a power of taxing, was an inconſiſtency in principle; for it was ſaying in the ſame breath, that the king was and was not the legiſlature; taxing the ſubject being undeniably one of the higheſt exerciſes of legiſlative authority. Nor was the argument on the matter of fact much better for the crown. As far back as the reigns of Ed-

ous a reſearch, by zeal for the conſtitution in one of the great points ſo eſſential to its continuance in a vigorous ſtate. But,

ward the firſt and Edward the third, that is, almoſt as far back as the records of parliament, thoſe moſt authentic ſources of our conſtitutional hiſtory, can be traced, the king has joined with the two houſes of parliament in moſt explicitly declaring, that to tax in any other manner than in parliament is contrary to the law of the land, and that all other forms of taxation are ſtrains of regal power incapable of being juſtified. It alſo happened, that excluſively of ſuch general legiſlative declarations againſt taxing out of parliament, there was ſcarce any particular mode of illegal and irregular taxation, but what at one time or another had been ſpecifically condemned. It was no wonder therefore, that Lord Coke, when he framed the petition of right in the reign of our firſt Charles, laid his foundation againſt the prerogative of taxing, as well as againſt the other exceſſes of that ill-adviſed prince, on the code of our antient ſtatute law; for it is obſervable, that, throughout that famous declaratory law, every propoſition is derived from that higheſt of all ſources for conſtitutional knowledge. Here one might eaſily imagine lord Coke, then nearly of the age of eighty years, to addreſs himſelf exultingly to the ſpeaker of the commons to this effect. "I propoſe to the houſe, not a theory of the beſt kind of government; not a change "of our conſtitution in the way of improvement: but the ſolemn declaration of an "actual and ſubſiſting conſtitution; one honorably derived to us from our hardy "anceſtors, one capable of being proved by teſtimony from the earlieſt records of "parliament; one, which has ſubſiſted for centuries, and ſurvived both the calami-"ty of various and long civil wars, and the tyranny of ſucceſſive ill adminiſtrations "of our government, even the ſanguinary reigns of the two firſt princes of the "Tudor line; nay, one, which even they found it convenient to add new ſanctions "to, by reſorting to its forms to give currency to their deſpotiſm and cruelty. "Thus ſtrongly fenced with the higheſt poſſible teſtimonies for a mixed and limited "monarchy, I wave all inferior proofs. I might perhaps evince from our antient "ſtory, that in all periods of time there was a freedom in our conſtitution; that "it was free to our Britiſh, to our Daniſh, to our Saxon, nay to our Norman an-"ceſtors; and that it was beyond the power of traditionary fable to name the "period, when our monarchs were unſhackled by parliaments. I might perhaps "trace the antiquity of our preſent legiſlative conſtitution, as compoſed of king, "lords and commons, or at leaſt the ſubſtance of it, as far back as the time when "the Roman government ceaſed amongſt us. But I will not travel unneceſſarily "into ſuch remote periods: I will not unneceſſarily waſte the precious time of this "houſe, or even my own time, in ſuch traditionary and dubious inveſtigations. I "will leave all theſe topicks to the curious antiquarian as his proper employment; "or reſerve them for the paſtime of private curioſity. Confident in the ſtrength of "parliamentary records, I will appeal to them only. If they are not deciſive in my "favour, or as I ſhould rather ſay in favour of the conſtitution and againſt monar-"chical deſpotiſm, I yield the victory to the devotees of the crown: I agree, that the "king ſhall ſingly exerciſe that higheſt power of legiſlation, the power of taxing: I "agree, that from henceforth the king of England ſhall be a tyrant; and that the reality "of parliament ſhall expire here, as it has expired in almoſt every other country in "Europe. I will not even aſk for aid from the teſtimony of that honeſt and gene-"rous lawyer, that high example of judicial chaſtity, that undefiled ſervant of a "court royal, the great lord chancellor Forteſcue. Even his admired printed book "*De Laudibus Legum Angliæ*, and the ſtill more valuable remains of him in the "manuſcript treatiſe on the difference between *abſolute and limited monarchy*, ſhall "be ſuppreſſed. I aſk only to put into my ſcale of a free conſtitution, and of a "limited monarchy, the *ſtatute rolls* and *other records of parliament*. Saving "*theſe only*, I conſent to put into the ſcale of regal prerogative, all the fables of "Britiſh antiquity, all the traditions of our Gothick anceſtors, all the imperfect "hiſtories of monkiſh annaliſts, all the vague arguments from the vague titles of "Saxon and Anglo-Norman laws, all the deceptive verbal criticiſm from words no

"longer

But, be this as it may, no undertaking could in my conception have been better calculated, either to juſtify the declaration of parliament on this head, or to demonſtrate by the moſt

" longer clearly underſtood, all the volumes of precedents of irregular and con-
" demned practices; nay even the vain arguments from the uncertain origin of
" the repreſentative part of our Engliſh parliaments, with the boaſted argument
" from the arbitrary adminiſtration of the executive magiſtrate whilſt our throne
" was filled with the proud Tudor line. Allow to me the benefit of the *magna*
" *charta* of our third Henry as confirmed by our firſt Edward, with the long ſeries
" of ſubſequent ſtatutes and parliamentary records; eſpecially the 34. of our firſt
" Edward againſt *talliages* and *aids* without conſent of parliament, the 25. of Ed-
" ward the third againſt *forced loans*, and the ſtatutes of the laſt-mentioned king
" with thoſe of the ſecond and third Richards againſt *benevolences* and *ſuch like*
" *charges*. Thoſe on the other ſide ſhall have the full and ſole benefit of all other
" records and teſtimonies whatever; with the additional weight of the king and
" his whole court; without excepting his accompliſhed but too pliant judges, or
" thoſe indefatigable hunters of precedents for violations of conſtitutional govern-
" ment, the great law officers of the crown. Should the ponderous weight of royal
" charters and parliamentary records fail me againſt ſuch an aggregate of influences
" in the oppoſite ſcale, I will agree, that the conſtitution of parliament muſt periſh;
" and that our kings muſt in future be abſolute and deſpotic ſovereigns.—Though
" too my ſcale, in conſequence of the wiſdom, integrity, juſtice, and firmneſs of
" this preſent houſe of commons, ſhould at preſent preponderate; yet from the in-
" creaſing degeneracy of thoſe out of this honourable houſe, I propheſy, that the
" high talents with the low ambition of future lawyers will ſoon again counteract
" our preſent ſolemn proceedings againſt the exceſſes of royal prerogative; and that
" future judges will ſoon ariſe to countenance thoſe exceſſes by new corruptions of
" judicial authority. But ſhould the conflict be once more revived, I truſt, that the
" freedom of our conſtitution will again triumph: and ſhould that conteſt ever again
" come, and another victory be gained over the pretended prerogatives of the crown,
" which events from the courſe of nature can ſcarce happen in my time, be it re-
" corded in the journals of this parliament, for the inſtruction of our lateſt poſterity,
" that ſuch a time, whenever it ſhall come, will not be the æra of a free govern-
" ment newly eſtabliſhed in reſiſtance of the abuſes of royal power; but will be the
" æra of mere ſalvation of a frame of government ſo antient, that authentic memo-
" rials are wanting to trace its origin with any thing like accuracy."—In the ſpeech thus imagined for lord Coke, when he preſented the petition of rights to the houſe of commons in the year 1627, there is a ſucceſſion of thoughts, which are the reſult of all the now editor's ſtudy of the antient conteſts between the crown and the ſubject, on the claims of prerogative to a right of taxation and other powers of a legiſlative kind. The ſame ideas in ſubſtance have often occurred to his mind, and he has long wiſhed to diſburthen it by an avowal of them; though till the preſent moment he has not ſo much as once made the attempt. True it is, that theſe thoughts are very general, are mere outlines for argument. To try their force, an inveſtigation of innumerable authorities is requiſite. He is not now prepared for ſo extended an enquiry; nor if he was, would it be either proper or practicable to introduce it in a preface to a collection like the preſent one. But looſe and general as the reaſoning is, it may perhaps ſerve as a preliminary memento for thoſe, who are curious and able to purſue the ſubject in its fulleſt compaſs.

With reſpect to the particular claim of a prerogative to tax at the ports, it was more than liable to the general objections of being a prerogative taxation; becauſe there was the addition of peculiar arguments againſt yielding to ſuch a precedent. It was this very ſpecies of regal impoſitions, which gave occaſion to ſome of the antient ſtatutes declaratory of the illegality of taxing without the conſent of parliament; as will appear by reading the incomparable ſpeeches againſt impoſitions at

moſt authentic proofs, that it did not change, but merely renovate, or rather declare the conſtitution.

I ſhall

the ports, by thoſe profound conſtitutional lawyers Yelverton and Hakewill. It was alſo an apparent bar to ſuch a claim, that it had not only been condemned in the reign of the firſt and third Edwards; but that from the time of the latter king, there had been a continual habit of granting duties of tonnage and poundage at the ports on the commencement of every reign, either for the life of the new monarch, or for a term of years. Nor is it to be forgotten, that prerogative impoſitions at the ports appear to have been dormant, from the reign of Edward the third, till after the acceſſion of queen Mary, the elder daughter of our eighth Henry. That princeſs indeed did cauſe a reſurrection of ſuch impoſitions, after their having been aſleep for near three centuries, by ordering ſome duties on cloth to be levied beyond what was warranted by the parliamentary grant of tonnage and poundage to her. But the then merchants of London were equally awakened by the meaſure; and they loudly complained, in the firſt year of Elizabeth, to that great queen, to be relieved on the ground, that ſuch impoſt by mere power of the crown was illegal. Their oppoſition is thus ſtated in lord Dyer's reports: and it was aided by an argument againſt prerogative duties at the ports; for Mr. Hakewill tells us, that Mr. Plowden, one of the moſt conſummate lawyers we have had at any time, compoſed ſuch an argument againſt the duties thus irregularly impoſed by Mary. From the ſame authority alſo, and from the account of the caſe in lord Dyer's reports fol. 165, it is clear, that notwithſtanding a conference of the judges on the occaſion, no ſanction, either judicial or extrajucicial, was ever obtained, in the reign of Elizabeth, for this exceſs of prerogative; or at leaſt that it was never thought fit to produce any opinion of the judges, or to aſſert that any ſuch was ever given by them in that reign.

Upon this tranſient view of the attempts to eſtabliſh a prerogative power of taxation, how can it be wondered at, that the raſh attempts of James the firſt and his ſon the unfortunate Charles, which latter really was poſſeſſed of many pleaſing and valuable accompliſhments, ſhould terminate in the diſgrace of the former, and the perſonal deſtruction of the latter? The father had to anſwer for attempting to ſyſtemize prerogative taxation. The ſon, miſled by the father's ill example, and having had inſtilled into his mind the moſt extravagant notions of the unbounded extent of regal power, not only adopted his father's illegal plan; but perſiſted in it, even after giving the royal aſſent to laws expreſsly condemning both generally and particularly all taxes of the ſubject except by act of parliament; and ſo at length the more deſerving ſon fell himſelf a victim to the adoption of a ſyſtem, which the far leſs deſerving father had begun to execute, with no other miſchief than one which his mind probably did not ſufficiently feel, namely, the diſgrace of being odious to and diſtruſted by his ſubjects. To the conduct of their predeceſſor, queen Mary, it was an objection, that ſhe had revived an ill precedent of prerogative taxation after a dormancy of centuries. But on the part of James and Charles, there ſeems to have been the aggravation of variouſly extending the bad precedent thus received from Mary; with the ſtill higher aggravation of influencing the judges into a public avowal of judicial opinions, which juſtified even the *principle* of taxing without parliament. It may not be uſeleſs to add to this long note, that the preſent editor is in poſſeſſion of a volume, formerly belonging to ſir Chriſtopher Yelverton, father to ſir Henry Yelverton; which contains, among other valuable law manuſcripts, not only a full report of the arguments of the judges and counſel in the Caſe of Impoſitions, but alſo the copy of a moſt elaborate argument in that Caſe by lord chief baron Fleming, from original notes written in his book, and in his own hand: Decided as the preſent editor is on this ſort of ſubject, he wiſhes not to conceal an iota of the learning on the contrary ſide of the queſtion. So far from it is he, that ſhould the preſent undertaking be continued, which however is not very probable, it is his deſign to publiſh the very argument thus mentioned. Nor is he afraid to apprize his readers in the mean time, that, notwithſtanding its great blemiſhes, it is ſo able a performance, as in many reſpects to deſerve a very

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I ſhall now take ſome notice of two ſubjects, which fall within the compaſs of lord Hale's obſervations in the treaties now under conſideration; one being IRELAND; the other being the *king's power of opening and ſhutting the ports*, and conſequently including the doctrine of EMBARGOES.

With reſpect to IRELAND, it is introduced by lord Hale in this manner. In chapter ſix of the third part of the treatiſe, he is very full in explaining the original of the great cuſtom of woolds woolfels and leather. In Dyer's reports fol. 165. this great cuſtom is repreſented to be due by *preſcription*; and certain it is, that in the firſt ſtage of the great caſe of IMPOSITIONS, on which I have already been ſo explanatory, the advocates for the crown appear to have laid conſiderable ſtreſs on the want of a ſtatute to prove the commencement of the great cuſtom *by grant of parliament*; though, in reſpect of our want of parliamentary records previouſly to the reign of Edward the firſt, the argument from ſuch a deficiency was in my mind feeble and inconcluſive. But afterwards on a ſearch of the records for the information of the houſe of commons in 1610,

ſerious attention, even from thoſe the moſt hoſtile to the unconſtitutional ſyſtem of taxing without a parliamentary grant. There remains to add to this tedious note, that beſides the books and authorities referred to in the editor's note to the *Caſe* of *Impoſitions* in the eleventh volume of the State Trials, our readers, who are curious on ſubjects of the conſtitution, may conſult what he has remarked about benevolences in a note to mr. Oliver St. John's caſe, which happened in 1615, and is in the ſame volume.—The editor cannot conclude this note without apprizing his readers, that he is poſſeſſed of an imperfect manuſcript tract, intitled, "Reflections "by the Lord Chief Juſtice Hale on Mr. Hobbs's Dialogue of the Law:" and that this performance, though an unfiniſhed one, contains both a very pointed refutation and a very ſevere reprehenſion of mr. Hobbs for his arbitrary notions concerning the extent of the king's prerogatives. In general lord Hale is the moſt diſpaſſionate of all writers upon our law and conſtitution. But he ſaw the pernicious tendency of mr. Hobbs's doctrine in ſo ſtrong a point of view, that in this inſtance lord Hale appears to have been ſcarce able to reſtrain his indignation. The following extract from the manuſcript, being on *taxation*, will evince this; and at the ſame time ſhew, how pure this exemplary judge's opinions were on that high ſubject.

"It is a thing moſt certain and unqueſtionable, by the law of England, no com-
"mon aid or tax can be impoſed upon the ſubjects, without conſent in parliament;
"and no diſpenſation or *non obſtante* can avail to make it good or effectual; no not
"for the maintaining of a military force, though in caſe of neceſſity. And that
"man, that will teach, that in all theſe caſes a tacit condition is implied, to let
"looſe laws of this importance, and to ſubject the eſtates and properties of the
"ſubjects to arbitrary impoſitions, notwithſtanding the ſolemneſt engagements to
"the contrary.—1. Takes upon him to be wiſer than the king himſelf, who hath
"not only granted, but judged the contrary.—2. Takes upon him to be wiſer than
"all the eſtates of the kingdom, as neither juſt or prudent adviſers for the good
"and ſafety of the kingdom.—3. Goes about to break down the ſecurity of all
"men's properties and eſtates.—4. Doth miſchievouſly inſinuate jealouſies in the
"minds of men, as if all the laws of the kingdom might be abrogated, when the
"king pleaſeth; and thereby does the king and his government more miſchief
"than he can ever recompence."

1610, when the judgment of the exchequer for the crown was under conſideration, a record of the 3. Ed. I. was diſcovered; which begins with calling the great cuſtom by the name of the NEW *cuſtom*; and after ſtating it to have been granted *par tous les graunz del realme, par la prière des communes des marchaunts de tout Engleterre*, gives, if not the tenor, at leaſt the effect of the ſtatute. This antient inſtance of a grant of duties to the crown by parliament, lord Hale anxiouſly preſents to the reader *verbatim* from one of the two records of Ed. I. amongſt which it is preſerved. It being alſo on account of its great antiquity a precedent of the firſt authority in favour of a parliamentary taxation of the ports, his lordſhip makes various comments upon it. His eighth obſervation, being on the *extent* of the cuſtom thus granted by the *Engliſh* parliament, is in the words following. "It was not only to England and "Wales, but alſo to *Ireland*; and by *virtue of this act of the* "*parliament of England, the kingdom of Ireland was charged* "*with this cuſtom*; and it is under that right the king holds "theſe cuſtoms in Ireland, and *holds them to this day.* It is "true, ſhortly after this grant the king did remit it for ſome "time in Ireland, and made an abatement for the ſame to the "merchants of Florence that farmed it. Clauſ. 7. E. 1. "m. 5. But it was ſoon reſumed, and continued under this, "and *no other title, for any thing I have yet ſeen or read.*"— "There was a time, when I ſhould have been diſpoſed to have made conſiderable uſe of this extract from lord Hale's work: but that time is now paſt, and as I conceive never can come again. The fact is, that ſome years ago it was foreſeen by myſelf as well as innumerable other perſons, that our unfortunate conteſt with America about taxation would ſoon awaken enquiries into the grounds of our claim of ſubordination from Ireland, and ſo rekindle an old controverſy on that ſubject. Having this probability in my mind, I became curious to inveſtigate the ſubject, and to conſider the principal arguments on each ſide. The reſult was favourable to the Engliſh ſide of the queſtion: though I am far from ſuppoſing that this might not be owing to prejudices, ſuch as may be expected to operate naturally, inſenſibly, and forcibly, upon the mind of a perſon born in England. When I had nearly convinced myſelf, that the weight of argument greatly preponderated for us, I proceeded to plan a ſort of hiſtory of the controverſy in all its ſtages, including what paſſed when the Engliſh declaratory act was made in the reign of George the firſt: and I actually executed a rough ſketch of this part of the deſign, which I ſtill have in my poſſeſſion. But this was

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a ſmall part of the object I had in view, and mere introduction. The main part of the deſign was to have exhibited the foundations of the claims of England; and to have done this without reſorting to any ſuch harſh and provoking language, as I have read or known to be ſometimes advanced in the ſupport of our pretenſions. I meant to have arranged my proofs of a ſubordination, under the three great diviſions of power *executive*, power *legiſlative*, and power *judicial*. On the firſt of theſe heads I ſhould have particularly conſidered, how the connection of our kings grew with Ireland: and how the government there was founded on a colony from England; which having been begun in the reign of Henry the ſecond, and being at firſt reſtricted within narrow limits, gradually increaſed, till what was called the *Engliſh pale* ſpread over the whole iſland; by the final completion of which enlargement, after violent ſtruggles and various revolutions, the Engliſhry and Iriſhry, in the reign of our James the firſt, became conſolidated into one people, and quite aſſociated under one government. Here alſo it would have been a great ſtreſs of the argument with me, that Ireland, by her own confeſſion, and by the conſtitution as laid in the firſt plantation of the colony there, and at laſt finally aſſented to by herſelf, takes her *executive* power from England in perpetuity; that is, agrees to accept for her king whoever for the time being ſhall be king of England. On the ſecond head I ſhould have aſſembled all the inſtances of an exerciſe of legiſlative power by England over Ireland, by arranging them under various heads; and I ſhould have inferred much from thoſe Engliſh ſtatutes, under which many proteſtants in Ireland are underſtood to hold their lands againſt the antient Iriſh Roman Catholic proprietors, for the ſake of ſhewing, that at leaſt the former could not conſiſtently deny the force of Engliſh ſtatutes in Ireland. With reſpect to the third head, I ſhould have endeavoured to have proved a ſubordinate judicature in Ireland from the infancy of the Engliſh colony there; and more particularly, that an appellant juriſdiction over Ireland by writ of error had been uniformly exerciſed *immediately* in the king's bench of England, and *finally* in the Engliſh parliament, as far back at leaſt as the reign of Edward the firſt. In reſpect alſo to the late commencement of Engliſh appellant juriſdiction, as exerciſed by the Engliſh houſe of lords over Ireland in equity cauſes, I ſhould have explained, that it was to be accounted for in a great meaſure, from the late adjuſtment of the appellant juriſdiction from our own courts having original juriſdiction in equity; it being well known, that the appellant juriſdiction of our houſe of lords was queſtioned

by

by an Engliſh houſe of commons, as lately as the reign of queen Anne. Having thus gone through the *matter of fact* as to the political connection binding England and Ireland together, I ſhould then have proceeded to ſhew, that the ſubordination contended for had as fair a foundation as the moſt admired governments in general have: namely, that however force and oppreſſion might anciently have operated; yet finally the ſubordination of Ireland to England in a certain qualified way, was ſanctioned by the conſent of thoſe over whom it is claimed; what paſſed between the two iſlands amounting impliedly to a ſort of contract between them, that the ſubordination of Ireland ſhould be taken by England as the price for ſuch an entire communication of its government laws and liberties, as ſhould conſolidate the inhabitants of the two iſlands into one nation. Therefore I ſhould have inſiſted, that rightly underſtood there was nothing inſolent in the claim over Ireland as a ſubordinate kingdom, nothing degrading, nothing which cauſes the leaſt individual inferiority as between the natives of the two iſlands; but on the contrary, that the inhabitants of both were perſonally equal in privileges, equal in liberties, equal in capacities to hold offices and eſtates, equal in every thing. Having brought the ſubject into this favorable point of view, and thus attempted to obviate all invidious diſtinctions, I propoſed to have concluded with ſtating certain inconveniences and embarraſſments, which might ariſe to both countries, if any of the three great links by which I then conſidered England and Ireland as politically united, ſhould be broken; that is, if Ireland ſhould inſiſt on independency in reſpect either of the executive magiſtrate, its legiſlature, or its judicature. Such was the project with which I once pleaſed myſelf, for the ſake of continuing what I then was inclined to think the true and proper lines of political connection between England and Ireland. But that project is now at an end; and I chiefly ſtate that it once exiſted, in order to expreſs, how my mind feels the adjuſtment which has been recently made. Ireland is now poſſeſſed of a legiſlature independent of the Britiſh parliament, and exerciſes appellant juriſdiction for itſelf with equal independence. She claimed a right to theſe independencies; and ſtatutes have been paſſed in Great Britain, which in ſubſtance acknowledge the right of Ireland to both. Theſe claims by Ireland then, with theſe acknowledgements by Great Britain, amount in my conſtruction to a ſolemn renunciation by the Britiſh parliament of all pretenſions either to legiſlate for Ireland, or to exerciſe judicial power over it in any degree or form; a renunciation without ſo much as one exception,

exception. From the moment therefore, that the Britiſh declaratory act of the reign of George the firſt was repealed, and that Ireland prevailed in obtaining from the parliament of Great Britain a renunciation ſo ample and unambiguous; all pretence for further controverſy on points ſo ſolemnly and finally decided ceaſed to exiſt; and ſo ſeeing the important tranſaction between the two iſlands, I thought it a duty incumbent upon me to deſiſt from further inveſtigation, or ſtirring points thus finally compromiſed by the proper authority. Whether Ireland was once connected with Great Britain by the three grand political links or not, certain it is, that only one great link now ſubſiſts to keep the two iſlands together; I mean the link from their having one common ſovereign. The two other links of the chain, thoſe from Great Britain's claims of legiſlative ſuperiority and of appellant juriſdiction, under whatever title they may have been heretofore poſſeſſed by her, are now ſo abſolutely periſhed and gone, that they can never be revived, unleſs Ireland ſhall voluntarily deſire it, without breach of faith in Great Britain, and conſequently without national diſhonour. Two of the three great links being thus diſſolved, let us from henceforth ſupply their place, by giving new ſtrength to links of another kind: I mean the links of reciprocal kindneſs between the two nations. Let the ſtern claim of empire be ſucceeded by a ſtrong and independant friendſhip. Though Great Britain might heretofore have looked down on Ireland, as the aged parent looks on the tender child; Ireland having now attained the age of ripeneſs, and being thus emancipated from all parental authority, let her henceforward be received by Great Britain as a younger ſiſter only. On the other hand, though Great Britain has now no longer the leaſt claim to a parent's authority over Ireland, let the latter iſland exert its natural and characteriſtic generoſity of mind, by in future evincing, that the ties of a ſincere family affection have more real and more permanent force, than the ſtrongeſt chains ever forged by the rigid hand of power. Some embarraſſing ſituations will moſt probably ariſe from the late adjuſtment of the political relation between England and Ireland: for how is it poſſible, that two ſuch great lines of a national conſtitution, as a declared and partly exerciſed ſubordination of legiſlature, and a long and at laſt fully-exerciſed ſubordination of judicature, ſhould be extirpated, without ſome temporary diſorders, ſome occaſional difficulties? The collective and political body in ſome points of view may be well reſembled to the individual and natural one. In both there is an infinitude of parts, by the conjunction and connection of which the whole and entire body is formed;

and

and ſuch conjunction and connection are more particularly obvious and eſſential between the great leading ſubſtances and the numberleſs ſmall inferior branches; which latter, being dependent in their nature, muſt be affected with at leaſt temporary diſorders and obſtructions, as often as the former experience an eſſentially new arrangement, however tending to improvement. But in both caſes, it appears more ſafe and prudent to wait patiently for the ſucceſſion of incidental diſeaſes, and to combat them ſingly as they ariſe, than at once to form too vaſt an enterprize, by immediately attempting to find out and apply one general remedy for their entire prevention. New political ſettlements will ever be accompanied with jealouſy in thoſe, who by their vigour of conduct obtain conceſſions; and with a proportionable ſenſe of pain in thoſe, whoſe fault or misfortune it is to have given occaſion to inſiſting upon them. Much time, joined with much experience of a mutually faithful adherence to the new ſtipulations (ſuch as evinces, that there is not any latent deſign on the part of thoſe gaining the conceſſion to make ſtill further claims; nor any latent inſincerity on the part of thoſe from whom the conceſſion moved, any latent deſign to revoke it) muſt be aſſuredly requiſite, before the jealouſy of the former can ſubſide or the pain of the latter be ſubdued. Nor whilſt theſe nice feelings are in full force, can it be otherwiſe than doubtful, whether it may not be in ſome degree premature to propoſe new extenſive engagements of any ſort between two countries, under influences and prejudices operating againſt a diſpaſſionate and impartial conſideration; by which only it ſeems poſſible to fix upon any further great arrangement for the benefit of both, without making an undue ſacrifice of the intereſts of one of them. It deſerves alſo to be conſidered, whether the conſequence of too early an attempt in this way, however perſuaſive the temptations to it, may not be, not merely a failure for the preſent, but an entire diſappointment of all hope of accompliſhing the intended good in future; or at leaſt a far longer poſtponement of it, than would probably happen, ſhould it be reſolved to wait for the moſt favourable opportunity of adopting ſuch an enterprize. General as theſe remarks in reſpect to England and Ireland are, they will not, it is hoped, either be loſt upon, or offend the cool penetrating and experienced reader. They are not pointed at any particular party or claſs in the ſtate. Nor ſhould they be applied to any arrangement paſt or to come. They are really intended with the generality in which they are expreſſed; being moſt ſincerely offered for the

the equal and common uſe of all deſcriptions of perſons in both iſlands. Throughout this ſhort conſideration of a very large ſubject, I have endeavoured to baniſh from my mind all corruptives of judgment whatever. Indeed I moſt ſtrongly feel, that on the intereſting ſubject thus obſerved upon, there is a great ſtake depending, no leſs than——whether two ſiſter iſlands ſhall continue to conſtitute one great and ſolid empire;——or, whether they ſhall become divided in affection and intereſts, and ſo both fall a prey to the envious ſurrounding nations; which are anxious ſpectators of every political tranſaction between the two countries, in order to find the means of aggrandizing themſelves at the expence of our humiliation. With ſuch a ſerious alternative impreſſed upon his mind, a man muſt be the verieſt of all ſlaves to his paſſions and his intereſts, who on ſuch a national concern ſhall ſuffer his opinions to be under the guidance either of political or of perſonal partialities, or of any other conſiderations beſides thoſe of publick good.

I now reach the important ſubject of the prerogative in reſpect to the *opening and ſhutting ports and* EMBARGOES. The reader will find this great head of prerogative treated in chapters 8 and 9 of the ſecond part of the treatiſe ſtill under conſideration. Indeed the firſt of theſe is not immediately applicable to the ports, being on the power of the crown to reſtrain perſons from going out and from coming into the realm. But this power as to the *perſon*, whether at the ports or elſewhere, and the power as to *merchandize* by opening and ſhutting the ports, are kindred prerogatives; and as ſuch lord Hale connects them, by firſt treating of the former, and immediately proceeding to explain the latter. On both he is ſo copious, that I doubt, whether the two chapters, I thus refer to, do not contain much more real matter, than all we have already in print being put together would amount to. However, full as theſe two chapters are, they are not the whole of his lordſhip's collections on the two prerogatives in queſtion; as appears to me from an examination I heretofore made of one of his manuſcript volumes on the rights and prerogatives of the crown in general: and as I preſume, that moſt lawyers will be anxious to ſee every line written by ſo very conſummate and upright a judge on a ſubject ſo material, I have given an extract of this part of the work laſt-mentioned

mentioned in a note below *, which I am enabled to do by the favour of the preſent poſſeſſor of the original manuſcript. Formerly I had myſelf made ſome collections

* What follows is an extract from a volume of Lord Hale's collection concerning the *Jura Coronæ*. It was copied by me from the original in lord Hale's *own hand-writing*, in the preſence of the worthy poſſeſſor of the manuſcript, and as I underſtood at the time with liberty to make ſuch uſe of it as I ſhould think fit. I have endeavoured to preſerve the ſpelling throughout.

" In the next place wee come to the kinge's power in OPENINGE and " SHUTTINGE the ports.

" Touching the SHUTTINGE of the ports.

" I. By reſtraininge of perſons to paſſe the ſeas.

Claus. 41. E 3. m. 25. dorſo B. 13. " By the ſtatute of *magna carta cap.* 30. *omnes mercatores, niſi publicè antea prohibiti fuerint, habeant ſalvum et ſecurum conductum exire de Angliâ et redire*, &c. But fuller in the charter of kinge John, where, after the ſaid act, *liceat de cetero unicuique de regno noſtro exire et redire ſalvò et ſecurè per terram & per aquam, ſalvâ fide noſtrâ, niſi tempore guerre vel per aliquod breve tempus propter communem utilitatem, exceptis impriſonatis et utlegatis ſecundùm legem terræ, et gente contra nos guerrinâ, et mercatoribus, de quibus fiat ſicut prædictum eſt.*

" By which and by many other authorityes it appeares, that at leſt till a prohibition every man may without any licence paſſe the ſeas. And thus the law continued untill the ſtat. of 5. R. 2. c. 2. which now ſtands repealed by the ſt. of 4. Ja. Yet it likewiſe appeares, that the kinge may by his prohibition reſtraine the paſſage of any perſon; and theſe reſtraints were of two kindes.

" 1. The particular reſtraint by the writt *de ſecuritate inveniendâ ne exeat regnum. Vid.* F. N. B. 85. This is cleare, and as cleare likewiſe, that the kinge may by his writt under the greate or privy ſeale command the return of any ſubject beyond the ſea. *Vide* for that and the paine of diſobeying it ſt. 13. Eliz. cap. 3. Dy. 12 and 176. 375.

" 2. The *general* reſtrainte. And this is clerely that intended by the ſtat. of magna carta, *niſi publicè antea prohibiti fuerint* (not as if it muſt bee a prohibition by act of parliament); and this appeares by the conſtant practice eſpecially in time of danger, when a free paſſage might either weaken the ſtrength or diſcloſe the ſecrets of the realme. *Vid.* claus. 11. H. 3. m. 25. dors. 10. H. 3. 27. dors. 2. E. 3. m. 5. dors. 3. E. 3. m. 36. dors. and infinite others. And this prohibition the kinge may take off generally or particularly as he pleaſeth.

Dy. 29. b.

Claus. 46. E. 3. m. 19. dors. B. 119.

" II. Touching the prohibitions of exportations and importations of commodities.

m. 35. dors. B. 126. " It is true, that by divers graunts in parliaments the ſea ought to be open for exportation and importation of merchandize. Rot. Parl. 18. E 3. n. 17. 22. E. 3. n. 8. *Item que paſſage de leines et d'autres merchandiſes ſoient overts ſans faire apreſtes ouſter la cuſtome a les merchaunts, que ont les cuſtumes du Roi par un certain, quele apreſt turne*

18. E. 3. cap. 3.

" *al*

ons concerning embargoes. But they are principally extracts from reports and books, which are in every lawyer's

" *al profit des dits merchaunts et outrageouſe grevance & nuſchance a votre* " *commun.* RESP. *Soit le paſſage overt, et que cheſcun poit paſſer fraunche-* " *ment, ſavant au Roi ce que lui eſt due.* Yet clerely the kinges of this " realme always exerciſed a power in reſtraint of the free paſſage of ſome " commodityes of this realme by their own power, as well before as after " 22. E. 3. And though complaints were made of it, yet the crown re- " tained the power. *Vid.* 25. E. 3. n. 22. 1. H. 5. n. 41.

" Some inſtances of the particulars.

" (1.) For exportation prohibited.

Vid. clauſ. 41. E. 3. m. 21. dors. B. 15. Clauſ. 48. E. 3. m. 11. dors. B. 159. Clauſ. 46. E. 3. m. 21. dors. B. 118.

" 1. The kinges have uſually before the ſtat. of 1. & 2. P. & M. cap. " 4. & 13. Eliz. cap. 15. prohibited the exportation of corne and graine; " becauſe the neceſſary ſuſtenance of the realme. And this is in effect " admitted legal, Rot. Parl. 17. R. 2. n. 39 Upon a petition for the re- " peal of ſuch a reſtraint, the anſwer was, *Le Roi le voet a preſent, pro-* " *viſo que bien liſe a ſon counſel a reſtrainer le paſſage quant il ſemble be-* " *ſoignable.* For ſuch reſtraints, *vide* clauſ. 5. E. 3. parte 1. m. 21. " dors. Rot. Parl. 50. E. 3. n. 156.

Clauſ. 47. E. 3. m. 12. dors. B. 127.

" 2. The kinges of this realme have uſually prohibited the exportation " of coigne and bullion before any act to reſtrain it, becauſe it is the riches " and wealth of the realme. Clauſ. 30. H. 3. m. 11.

Of wools and woolfels, 49. E. 3. m. 21. dors. B. 170.

" 3. The kinges of this realme have uſually prohibited the exportation " of armes, or ſuch other thinges as are for the neceſſary defence or " ſtrength of the realme. *Vide* clauſ. 10. E. 3. m. 31. dors. a proclama- " tion inhibiting the exportation of boards or timber for ſhips. Clauſ. 38. " E. 3. m. 29. a prohibition of exportation of horſes, falchons, thread, " bowes, arrowes, bow-ſtringes, and arms, and to arreſt the ſhip and " goods. The like prohibitions of commerce with enemies.

Clauſ. 43. E. 3. m. 3. dors. B. 50. Now ſettled by the act of 1. Eliz. cap. 11.

" 4. The kinges have uſually reſtrained the paſſage of cuſtomable " goods to ſome particular ports for the better preventinge of defraudinge " of cuſtomes, and at theſe ports the cockets kept. Thus did E. 3. " Clauſ. 5. E. 3. parte 1. m. 12. dors.

" And in theſe caſes prohibitions of this nature were legall, and for the " moſt part the cohertion was by ſtay of the ſhip or goods prohibited; for " no proclamation could induce a forfeiture; and for that cauſe moſt of " theſe thinges were provided for by act of parliament, which ſubjected " the party to a forfeiture or other penalty.

Vid. the penalty for breaking ſuch an arreſt, Clauſ. 46. E. 3 m. 28. B. 110.

" (2.) Now for an inſtance of a reſtraint of foren trade or importation. " —Upon this the acts of magna carta, cap. 30. 9. E. 3. cap. 1. 25. E. 3. " ſt. 4. cap. 2. 2. R. 2. cap. 1. lye heavy; and it hath been ſeldom prac- " tiſed. *Vide* a reſtraint of foren trade in Ireland, 3. R. 2. n. 44.

" Thus much for the kinge's power of ſhuttinge the ports; which, " though it was ſometymes uſeful and profitable for the kingdom, yet of- " tentymes was made a meanes of great damage and oppreſſion, which " did ariſe by lettinge looſe the reſtraint to particular men for profitt.

" And ſo ariſeth the next conſideration of the kinge's POWER OF OPENINGE the ports.

" The kinge might open the paſſage, which either by his own procla- " mation he had reſtrained, or which by act of parliament were reſtrained, " either

Vid. Clauſ. 46. E. 3. m. 22. dors. B. 118.

lawyer's reach; and ſince having ſeen lord Hale's ſuperior collections, I am become too much out of conceit with my own to give them in print. Nor ſhall I, at leaſt on the preſent occaſion, venture to dwell very much on a ſubject, which, from lord Hale's cautious and doubtful manner of handling it, I perceive to have been conſidered by him, as having far more both of difficulty and delicacy, than heretofore occurred to my mind. It is alſo an additional reaſon with me for being now more reſerved, that I obſerve in one part of ſir Henry Yelverton's argument in the CASE of IMPOSITIONS ſome weighty conſiderations on the nature of the king's prerogative at the ports, which of themſelves are enough to cauſe a very ſerious deliberation before riſquing any remark on ſuch a ſubject. There is however one point, on which I already ſtand in ſome degree committed, by my preface to the eleventh volume of the State Trials, where my aim was to queſtion the propriety of reſtricting the prerogative of laying embargoes, whatever may be its nature or extent in other reſpects, to the *ſingle emergency* of *actual war*. Even on this point, when I firſt read lord Hale's collections, I thought myſelf in danger. But, fortunately for me, I find, that ſo far as relates to the diſtinction between *actual war* and *other public calamity*, againſt which my remarks were apparently directed, there is enough in his lordſhip's view of the ſubject to countenance my manner of obſerving upon it in the preface before cited. And here notwithſtanding my preſent confeſſion of the neceſſity of great reſerve on ſuch high topics, I cannot refrain from remarking a little on the turn of a very famous parliamentary debate in the preſent reign on the law of *embargoes*. The ſubject of it aroſe thus. In the autumn of the year 1766 an alarming diſtreſs was cauſed by the ſcarcity of wheat, and there was an apparent danger of the want of a ſufficiency to ſupply the conſumption of the country: under which preſſure the crown by advice of the privy council iſſued a proclamation for an embargo on all wheat and flour going out of the kingdom, until the

"either in reſpect of this or that particular commodity; as when exportation of "ſome particular wares were reſtrained in reſpect of the place, as the tranſportation of wools to the ſtaple. This is cleere and without queſtion, whereof before. Theſe licences were alſo complained of, and often enacted againſt, but "could never be remedied. *Vid.* 21. R. 2. n. 82. and the procurers of ſuch licences puniſhed. 51. E. 3. n. 17. *Vid.* 27. H. 6. n. 29. 9. H. 6. n. 37."

advice

advice of parliament could be taken. Soon after the parliament was aſſembled; and then this embargo, though confeſſed to be an expedient meaſure, was treated by ſome great leaders in both houſes as an adventurous breach of the ſtatute of 15. Cha. 2. c. 7. which permits the exportation of corn and grain when under a ſpecified price. This ſeeming reproach cauſed warm debates in both houſes. In the upper houſe, two lords then high in adminiſtration, who were not leſs diſtinguiſhed for their ardent love of liberty than for the moſt ſplendid and captivating oratory, took fire at the imputation of having acted illegally; and in the warmth of the moment for once in their lives uttered words thought to be unfriendly to the conſtitution of their country; their defence of the meaſure having been conſtrued, to attribute to the crown a power of diſpenſing with and ſuſpending acts of parliament in ſuch a caſe of extreme emergency as imminent danger of famine. Off their guard, thoſe truly great men could not have been on a more tender ſubject of law; and even though there had been no political enmity to ſharpen the provocation, the mere ſemblance of a diſpenſing doctrine was enough to cauſe alarm. Accordingly, the moment they were ſuppoſed to be ſufficiently committed, a torrent of rival eloquence burſt forth from a law-lord ſtill in office; who levelled his choiceſt thunder againſt the juſtly odious and condemned prerogative of ſuſpending laws, and ſo ſeemed to ſet at defiance thoſe united powers, which on ſome former occaſions he had not ſhewn himſelf ſolicitous to combat with ſingly. In the lower houſe the debate is repreſented to have taken a ſtill more vehement courſe; for there an ancient member, who had for years profeſſed zeal for our laws and liberties, is ſtated to have aſſerted broadly, that "whenever the public is in danger, the king has a "diſpenſing power;" which gave ſuch ſtrong offence to the houſe, that he found no ſmall difficulty in delivering himſelf from ſerious conſequences by repeated explanations of his original words. The reſult of the whole was paſſing an act of indemnity, as well for thoſe who adviſed the embargo, as for thoſe who executed it; and in this act it was recited, "that the embargo could not be juſtified by law." After frequently reflecting upon this tranſaction, the firſt day's debate upon which in the houſe of lords I myſelf heard, it occurred to me long ago, that there may be ſome reaſon to doubt, whether the ſuppoſition, that this famous embargo

was

was clearly indefenſible on every other ground, as well as on the hateful and unconſtitutional ground of a ſuſpending prerogative in the crown, is really well founded. To expreſs more than a doubt on a point taken *pro confeſſo* by the legiſlature, would be indecent in a private individual of any deſcription. But under the peculiar circumſtances, to which I impute the condemnation of the meaſure as illegal, it may perhaps be excuſable even in me, if, for the ſake of other important caſes which may in future ariſe, and to prevent prejudice to the general queſtion on the crown's power of laying embargoes in time of war, time of famine, and other ſuch great public emergencies, I riſque a few obſervations upon the turn of the debate before ſtated. I do moſt heartily agree, that the embargo was not defenſible on the ground of a ſuſpending power in the crown; and that all doctrine of ſuch a tendency, though it ſhould come from the greateſt ornament and friend the country ever had, ought to be inſtantly and ſtrongly reſiſted. But is it certain, that there was no other reſource of argument, wherewith to have ſaved the embargo of 1766 from parliamentary condemnation? Is it perfectly clear, that the ſtatute of Charles the ſecond intended more than to remove certain prohibitions or impediments, which then made or were ſuppoſed to make the exportation of corn unlawful? Without going into a long and intricate inveſtigation on the previous ſtate of our law relative to the exportation of corn, is not the language of the ſtatute itſelf an implication, that at leaſt there was prevalent a notion of ſome exiſting prohibition againſt exporting corn; the liberty to export being given, with the addition of theſe words, *any* LAW STATUTE *or* USAGE *to* THE CONTRARY *notwithſtanding?* Is it undoubted law, that, becauſe a commodity is *in general* exportable, therefore it cannot be touched *for a time* by an embargo? Had this laſt queſtion been put to the noble law-lord, whoſe eloquence was the chief cauſe of procuring a condemnation of the embargo of 1766, would he ſtill have anſwered that it was illegal? If he would ſo have anſwered, would it have been, becauſe he thought, that there is no power in the crown to lay embargoes without the ſpecial authority of an act of parliament; or becauſe he conceived that ſuch a prerogative, notwithſtanding the poſſibility of groſs abuſe of it, really exiſted, but that it was only exerciſeable in times of *actual war*; or becauſe though it might be exerciſeable in time of danger of *famine* or of any other great public calamity, yet it could

could not be exerciſed on any *ſingle* commodity, but muſt be *general* and reach to *all* merchandizes whatever? Laſtly, how would the noble lord alluded to have anſwered, if he had been aſked, whether a ſtatute, made to legalize a prohibited exportation or one ſuppoſed to be prohibited, ought to be conſidered as made to alter in effect the law of embargoes; and if not, whether an embargo, otherwiſe legal, became illegal, merely on account of ſuch a ſtatute made *diverſo intuitu*? Theſe queſtions are propoſed as the moſt decent manner of opening the courſe of my mind on the famous ſubject of the embargo of 1766; and of ſhewing, that the doctrine of diſpenſing with and ſuſpending laws was as foreign to the real general queſtion, which was then to be decided upon, as it ever is alarming. But though I have certainly marked the proceſs, by which I conceive the law of the caſe ought to have been explored; I muſt proteſt againſt having it underſtood, that my ſentiments are made up on all the points thus ſtarted. It is far otherwiſe; more eſpecially ſince reading lord Hale's collections on the ſubject of embargoes. What I wiſh upon the whole to convey to the reader is, that, if the declaration, of the illegality of the embargo of 1766, is conſidered as a declaration againſt its being indefenſible on the principle of a diſpenſing or ſuſpending prerogative, it cannot be too much applauded: but that if the declaration, as in ſtrictneſs from its unqualified generality is the literal conſtruction, ſhall be taken as a condemnation of the embargo on every other poſſible ground, it is to be lamented, that thoſe other conſiderations, I have ſuggeſted, had not been made the ſerious topicks of diſpaſſionate debate. Nor can I conceal, that, ſo far as my weak judgment of the matter goes, the doctrine of embargoes, which before was too much involved in doubts and difficulties, is now left with ſuch new accumulation of embarraſſment, as to require a ſpeedy adjuſtment of the law on this power of the crown, by a ſhort ſtatute, not only fixing its extent with certainty, but to the utmoſt guarding its exerciſe againſt all poſſible abuſe. It is very eaſy to ſay, that an illegal embargo may in a great and apparent extremity be reſorted to; and that afterwards parliament will ſanctify the deed by a ſtatute of indemnity. But, beſides the danger of familiarizing ourſelves to the exerciſe of illegal powers by the crown, may it not be doubted, whether, when it is once become

current, that an embargo is illegal, there is not a probability of its being reſiſted; and if reſiſted, whether very fatal conſequences might not happen to thoſe employed to enforce it? Thus having exhauſted all I have at preſent to advance on the law of embargoes, I ſhall now take my leave of it, by apprizing the reader, that there is exiſting in the hands of others as well as of myſelf a moſt copious and learned diſſertation in favour of the legality of embargoes. It was compoſed in January 1778, and was given in the form of an opinion on a then recent Iriſh embargo, by a king's ſerjeant at law; whoſe profoundneſs and extent of legal knowledge would entitle him to be claſſed on the ſame form with the famous mr. Plowden, if that great lawyer had been born to ſhine a living ornament of the preſent times.

II.

The ſecond tract in the volume is on a ſubject to which lord Hale appears to have frequently directed his attention: for beſides this unfiniſhed piece on the amendment of our law, I have another fragment of his compoſition on the ſame ſubject, being one of the manuſcripts of which mr. Jekyll's kind preſent to me conſiſted; and there are alſo ſome thoughts tending to a like point, intermixed in lord Hale's excellent preface to ſerjeant Rolle's Abridgment, of which his lordſhip was the editor.—In the treatiſe now preſented to the publick, there will be found a great variety of things to recommend it.—In the general conſideration of alteration of laws, the reflections made by lord Hale almoſt exhauſt the ſubject; for ſo deeply he appears to have thought upon it, that ſcarce a caution againſt being either too yielding to alteration or too averſe to it can be ſtated, which he has not ſuggeſted. It is to be lamented, that when he reaches the particular ſubject of our own laws, he was not equally copious; and that he did not find opportunity of compleating this part of his deſign. However the ſubjects he has touched upon are intereſting. Two of them are now particularly ſo, as like topicks have for ſome time paſt been, and ſtill are under parliamentary conſideration. I mean the ſubjects of *reforms of office*, and the *crown lands*.——With reſpect to the former, the commiſſioners of public accounts, to whoſe maſterly

maſterly labors the nation is ſo much indebted, will not have reaſon to be diſpleaſed; becauſe they will find, that they are actually anticipated in ſome of their ideas of official reform, with ſcarce a poſſibility of their knowing it. Thoſe, who befriend the ſale of the crown lands will not be equally flattered; for it is clear, that his policy was to nurſe and improve the landed eſtates of the crown, not to diſpoſſeſs the crown of them; though in his time they were of far greater value and extent than they now are. His mind might be ſtrongly impreſſed with the cloſe connection between the king and his ſubjects, through the medium of *tenures*; and thence perhaps had imbibed an invincible prejudice againſt any meaſure tending to annihilate for a time what originally was the chief prop of the monarchy. Perhaps though no judge ſeems to have ever mixed with his loyalty to the crown more jealouſy of its affecting independence of parliament, he might have ſtartled at a policy, which, if accompliſhed, might produce a phenomenon in a monarchy of feudal extraction:—a king of Great Britain beginning his reign without an acre of land for his patrimony; nay with ſcarce any other pittance to ſubſiſt upon till parliament ſhould be aſſembled to relieve his diſtreſs. Perhaps though lord Hale might have thought, that it certainly would endanger the conſtitution of parliament, if the hereditary eſtates of the crown ſhould become ample enough to enable the king to carry on the government for any length of time without parliamentary aids; yet on the other hand he might have revolted at the idea of ſeeing the crown ſo degradingly impoveriſhed, as not to be able either to diſcharge its public functions, or to diſcharge its private expenditure for one moment, without aſking a boon from the two houſes of parliament. Lord Hale had been the ſpectator of a revolution, which for a time had overturned the monarchy; and well knew, that, notwithſtanding the brilliancy of its reſtoration, there ſtill ſubſiſted a ſtrong ſpirit of enmity to the crown, ever lying wait to undermine it. In his time, therefore, he might have cauſe to fear, that even momentarily ſeparating from the crown the whole of its landed patrimony might be eſtabliſhing a moſt dangerous precedent, for gradually diſſolving that variety of connections between the crown and people, in the maintenance of which in due vigor the adherency of the monarchical part of our government to its other conſtituent parts muſt depend. All this one might eaſily

ſuppoſe to have influenced the mind of lord Hale, when he was writing the chapter on the inconveniences in the management of the king's revenue, one object of which is explained to be, that the hereditary revenues of the crown might not be impaired. If there was force in ſuch reaſoning in his time, there was ſtill greater ſome years after, when queen Anne ſucceeded to a crown far more impoveriſhed in its landed poſſeſſions, than Charles the ſecond. It is no wonder therefore, that on her acceſſion a policy ſhould be adopted by parliament, the profeſſed object of which was not merely to preſerve the ſmall remainder of the royal patrimony, but to effectuate gradually ſuch an increaſe of it, as might reſtore the diminiſhed dignity of the crown without in the leaſt endangering our free conſtitution. Hitherto that policy has operated with ſuch ſurpriſing ſlowneſs, that the ſum total of the clear produce from the land revenue of the crown, including Wales and the Duchies of Lancaſter and Cornwall, is inferior to the clear income from the landed eſtates of ſome of the king's ſubjects. It muſt, however, be confeſſed, that a time may come, when this policy, with the increaſe from contingent acceſſions by eſcheat and forfeiture, may ſo have augmented the landed revenue of the crown as to render it formidable; more eſpecially when it is conſidered, how great the revenue is, with which the crown muſt neceſſarily continue entruſted for keeping down the intereſt of the national debt. Whenever alſo that time ſhall come, it will be as convenient to remove the reſtraint of alienation, as in the reign of queen Anne it was to impoſe it. But till ſuch a time ſhall approach, the ſubject may well deſerve ſerious conſideration, before the policy of cheriſhing an increaſe of the landed eſtates of the crown ſhall be ſacrificed to leaving the crown without any land revenues whatever, under an imagination, that the ſale of ſuch a trifle in point of produce in money will materially leſſen the national debt. I remember, that, in a book by mr. Howell, on the precedency of kings, which was publiſhed ſoon after the Reſtoration, that induſtrious author, amongſt other pretenſions of ſuperiority attributed by him to the crown of England, makes high boaſt of its palaces, its foreſts, its chaſes, its parks, and its ſplendid domain in land of every poſſible deſcription. This, I confeſs, ſavours much of rant and declamation. Yet I cannot think, that his ſtreſs on ſuch royal appendages is wholly without foundation: for though having large crown poſſeſſions in land may

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not ſuffice to ſettle the point of precedency between rival kings; yet I can conceive, that our king's having ſome landed property may be eſſential to the preſervation, both of his own dignity, and of a due connection with his ſubjects. However, it would be unjuſt to leave this digreſſion, without firſt doing juſtice to him who is underſtood to have firſt ſuggeſted a ſale of the crown-lands in the preſent times. The propoſition was introduced with an eloquence, which would have honoured even Athens or Rome. Nor is there room for ſuſpicion, that this eloquence was exerted otherwiſe than with perfect integrity of intention.

It is no more than might be expected from ſuch active zeal for public good as lord Hale's, that, notwithſtanding the unuſual weight of his judicial and profeſſional fatigues, and the variety of ſtudies to which he was addicted independently of the law, he ſhould be prompted to give ſome attention to the reduction and improvement of the laws of his country, and to encourage others in like undertakings. Long before his time, lord Bacon had anxiouſly laboured to accompliſh a work of the ſame laudable kind, as appears by ſeveral of his printed works: namely, his propoſal for amendment of our law, made to the crown whilſt he was attorney-general; his offer, when under his diſgrace and troubles, to aſſiſt in compoſing a digeſt of our laws both common and ſtatute; and his remarks on obſcurity, accumulation, and new digeſts of law, in his great work De Augmentia Scientiarum. Thus even in lord Bacon's time the evil from the obſoleteneſs of various titles in our common law, and the evil from the encreaſed bulk of our ſtatutes, were ſufficient to ſtrike his mind as a ſerious one. After the Reſtoration both evils not only had conſiderably encreaſed; but from the great revolution as to the law of real property, which then took place under the ſtatute converting military tenures into ſocage, and from the increaſing frequency of new laws, were likely to be yearly more aggravated. Lord Hale certainly took alarm at this proſpect of growing inconveniences in a venerable and fine ſtructure, which from its antiquity was already encumbered with too many uſeleſs apartments, and from the nature of our conſtitution was particularly open to a ſuperabundance of new acceſſions. Hence therefore, notwithſtanding his apparent jealouſy of the proneneſs to innovation, for which the

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age in which he lived had proved itself almoſt characteriſtic, he convinced himſelf, that ſome remedy was become requiſite, to reduce and ſimplify our ſyſtem, as well by lopping off antient redundancies, as by encouraging an orderly digeſt and a correct elucidation of all the remaining matter. The former purpoſe could not be attained without the ſanction of the legiſlature. Nor could either be effectuated in the beſt manner, without an union of private labors in the extended vineyard of juridical learning under the foſtering encouragement of royal patronage. For where was the ſingle individual equal to ſo vaſt a deſign? where could have been found the many qualified by education ſtudy and talents for a joint execution, whoſe ſituation would allow them to make the neceſſary ſacrifice of their time without a proſpect of retribution from their country? or how could it be expected, that lawyers, ſuch as the great Tribonian and his illuſtrious aſſociates, would deſert all private purſuits and all profeſſional emoluments for the ſake of digeſting national laws, without a Juſtinian to patronize their toils, and to reward them with ſome portion of diſtinction and independence? Lord Bacon's diſcernment apparently ſaw the matter in this light; for from the beginning he addreſſed king James, as if royal countenance was eſſential to the execution of ſuch high plans: nor could lord Hale be ignorant, that in England ſuch enterprizes wanted the patronage of an Edward the firſt to feed and cheriſh them. So far as ſingle perſons, ſo much detached by public employment and important ſtudies and occupation of another kind, could well contribute by the combined exertions of genius and learning, was performed in a very conſiderable degree by Bacon, and in a very wonderful one by Hale. Pity it is, that, from their times down to the preſent moment, the body of our law has been ſuffered continually and rapidly to increaſe, with ſcarce any other aids to contract its bulk or preſerve its conſiſtency, than thoſe of occaſional private contribution. What would a Bacon or a Hale have ſaid; what would they have adviſed; had they lived to have ſeen our ſtatute law not only ſwelled already into more than tenfold ſize beyond that which ſo alarmed their apprehenſions, but ſtill yearly extending its dimenſions by ſuch a ratio, as muſt ſoon terminate in a bulk immeaſurable by the moſt induſtrious and accompliſhed of legal underſtandings? Would two ſuch zealous friends to Engliſh juriſprudence, far exceeding even the Tribonian and Theophilus

of

of the ſchool of Roman law, have been mere ſpectators of the moſt dangerous of all juridical diſeaſes? Would they not have generouſly offered their aid, towards forming a plan, for as gradually curing this diſeaſe of infinite accumulation, as it has been gradually and almoſt imperceptibly contracted? Would they not, were they now living, have earneſtly ſupplicated the ſovereign, or perhaps the parliament, to ſave the country from that ruin, which muſt enſue the moment the ſcience of law and the adminiſtration of juſtice ſhall ceaſe to be practicable?—Theſe queſtions lead the mind into ſuch a field of high national topicks, that I fear at this time to continue the train of thoughts, which momentarily occur to me. To engage in ſuch an enterprize, at any time, or under any circumſtances, might be extreme raſhneſs in one ill ſituate and ſparingly endowed as I am. It is an ocean far too boiſterous for a little ſhattered bark like mine; and therefore cannot be too ſoon quitted.

III.

The third article of the volume is a far more copious account of the office of maſter in chancery, than has ever been yet printed. It contains internal evidence, that it was written by a maſter in chancery, whoſe views it was to reſtore to his official ſituation what he conceived to be its antient rights and pre-eminences: and what gives a particular weight to his repreſentations is, that throughout he chiefly derives his materials from public records.

Though only very few hours * remain for compleating this Preface, I cannot forbear from here adding ſome obſervations concerning the important office of maſter, which ſtrike me as properly ariſing from a peruſal of the tract upon it.

It is well known, that maſters in chancery are honoured with ſeats on the woolſacks in the houſe of lords; the origin of which diſtinction probably was their being companions of and aſſeſſors to the lord chancellor or lord keeper for the time being. Equally true is it, that they are in an almoſt dormant ſtate in that noble aſſembly; being either the mere pageants of the day, or at the utmoſt only employed as ſervile inſtru-

* Though thus preſſed in time, I cannot forbear acknowledging, that, without the condeſcending aſſiduity of my worthy young friend and pupil Charles Proby, eſquire, barriſter at law, in ſtaying by me as a voluntary amanuenſis, a ſtill further delay of the preſent publication muſt have happened.

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ments for carrying meſſages to the lower houſe. But from the tract in queſtion it will appear, that antiently they were attendants on the lords for the honourable and important purpoſe of adviſing the lords on thoſe branches of learning, which belong to their occupation in the ſphere of juriſprudence: and conſidered in this point of view, they were properly placed near to the judges, who are called upon to aſſiſt the lords in a ſimilar way. Here too the reader will be informed, how the ſilence, under which the maſters have ſo long languiſhed in the upper houſe of parliament, began. It ſeems, that a maſter in the reign of Elizabeth raſhly and indecently opened his mouth, without waiting to be called upon by the lords. The immediate conſequence was, not merely a reprimand to the offender, but a moſt laſting puniſhment to the whole order; for from the time of the offence thus committed, other law-attendants on the houſe were placed above them, and not one maſter has ever ſince been required to utter ſo much as one word. The cauſe of this long ſilence of about two centuries being thus made known, perhaps it may be at length thought, that the offence, for which the penance was impoſed, is now ſufficiently atoned; and that for the ſake of public utility this extraordinary mode of puniſhment ſhould from henceforth ceaſe, and the maſters be again allowed to exerciſe the faculty of ſpeech, with all the energy of their more antient predeceſſors in office.

Another diſcovery equally important ariſes from the treatiſe in queſtion. It is undeniable, that, with the exception of very rare inſtances to the contrary, maſters in chancery have very long been mere *nominal* aſſeſſors to the lord chancellor and maſter of the rolls on their reſpective judicial ſeats. When indeed a judge ſits for the lord chancellor, it is under an authority in which two maſters are joined; and then it is underſtood, that they are *co-judices*, and therefore have a right to *offer* their opinions. But ſo fixed in them is the habit of ſilence, that, even when thus in a ſituation which ſeems to exact the freedom of ſpeech from them, it perhaps would be deemed preſumptuous, if they were to interpoſe themſelves. A very reſpectable maſter, now living, once was bold enough to put in his claim to a ſhare of the judicial function when thus ſitting as *co-judex*, by avowing and defending a difference of opinion; and it is ſaid, that inſpired by his example a brother maſter

maſter had the courage to join him againſt the judge then on the bench. But this is the only inſtance of *voluntary* interference with buſineſs on the bench by a maſter, which I ever heard of: and as to *involuntary* opinions, ſo rarely have they been aſked for in the two laſt centuries, that it would be a ſpecies of cruel ſurprize now to call for their ſentiments in court, without a previous notice, that ſuch aſſiſtance will be in future expected. How far it might be proper to attempt reviving the antient uſage of treating maſters on the chancery bench as *real* and *effective* aſſeſſors, is a point moſt fit to be conſidered by the high judge, for whoſe aſſiſtance, in the arduous taſk of adminiſtering equity, they were originally elevated by the conſtitution into ſuch nearneſs to him. The reaſons in favour of any arrangement of this ſort are far more ſtrongly urged in the treatiſe itſelf, than I ſhould be able to ſtate them. If there is real weight in thoſe reaſons, it cannot be juſtly doubted, but that at this time they will produce their proper effect.

The fifth diviſion of the treatiſe is entirely on the rewards and emoluments of maſters; and amongſt other propoſitions for the advantage of the office held by its author, one is, that maſters ſhould be allowed fees for their hearing of parties on references and for their reports. From this it ſeems inferable, that when the author wrote, which, as I conjecture, was between 1596 and 1603. the reward, which now conſtitutes the chief recompence for the only preſent effective duties of a maſter, was not then eſtabliſhed. However it was not long before it was thought fit by the crown to make ſome amends to the maſters for the diminution of their antient rewards from loſs of the various emoluments *, which the treatiſe ſtates to have been antiently their due: for in the 18th of James the Iſt it appears, that a privy ſeal for fees had been recently granted to the maſters; and that it became a ſubject of parliamentary enquiry. Whether this enquiry was in any reſpect grounded on

* It appears by the treatiſe I am remarking upon, that the office of clerk in parliament was antiently one of the collateral offices ſometimes conferred on maſters; and though this habit has long ceaſed, it can ſcarce be denied, that the nature of that office gives fair pretenſion to the expectation of profeſſional perſons. The gentleman who now ſo ably performs its duties as clerk aſſiſtant is a proof, how uſeful it is to yield to the weight of ſuch claims. The preſent clerk and clerk aſſiſtant of the commons, both of whom are barriſters, are alſo ſtriking examples of the advantage from ſuch a preference, and conſequently confer honour on thoſe from whom it proceeded.

on the generality of the proviſion againſt fees by the ſtatute of 1. Jam. 1. for the better execution of juſtice, from any doubt of there being any inherent power in the crown to burthen the ſubject with new fees of office, from any objection to the extent of the fees ſo granted, or from any exaction under colour of them, I am not ſufficiently informed. But whatever the cauſe of the enquiry might be, this diſpute about the fees of maſters certainly became ſerious; as appears by the journals and debates of the commons in 1620 and 1621. Indeed the attack was more eſpecially to be feared; becauſe the complaints againſt lord Bacon, as chancellor, had at that time without doubt excited no inconſiderable portion of prejudice againſt all connected with him in the adminiſtration of equity. But I have not as yet diſcovered, that this parliamentary inveſtigation was followed with any alteration of the fees, thus examined probably with a view to their condemnation: and certain it is, that the preſent reward of maſters in chancery is ſo very ſlender, independently of official fees (either the ſame as thoſe appointed by the before-mentioned privy ſeal, or others of a like kind ſince eſtabliſhed in their place) that, without ſuch fees, none could undertake an office of ſuch rank and ſo onerous in real duty, except the few who are poſſeſſed both of fortune and zeal enough to undertake labouring officially for the public benefit without any ſort of reward. Here then this ſubject is brought to a point, which well deſerves attention: namely, whether it would not be greatly for the public benefit to render the ſtill important, though perhaps greatly curtailed, office of a maſter in chancery quite independent of fees; an idea, which might be executed, by ſecuring to them a permanent ſalary adequate to their labors and rank, and appropriating all fees received at their offices to the augmentation of the public revenue. Such an arrangement would probably not only encreaſe the reſpect ſo eſſential to the diſcharge of duties, in which the whole nation is neceſſarily intereſted; but at the ſame time tend greatly to quicken the various buſineſs of ſuitors in equity before maſters, and ſo remove the pretence of imputation againſt the very reſpectable deſcription of perſons, on which the office is generally conferred. With reſpect to the preſent maſters, all of whom I believe to be of unimpeachable eſtimation, it is not probable that they will be obſtacles to any ſuch arrangement as I have hinted.

ed. With ſome few of them I have the honour of being perſonally intimate; and I am convinced, that at leaſt their nice ſenſibility will be relieved by ſuch a change. Of all the others, my impreſſion from their characters tends to induce a belief, that they would not be leſs obliged by it.

IV.——V.

The fourth article of the volume conſiſts of two curious and antient remnants concerning the juriſdiction of equity, as it was variouſly conſidered in the time of the famous author of the Doctor and Student; that is, both by the then enemies and friends of that lofty branch of juriſdiction.

The fifth article of the volume ſeems to have been an effort of lord Hale to compromiſe the diſputes between the courts of king's bench and the common pleas, whilſt he was chief baron. Thoſe, who chuſe to enter further into the merits of that unpleaſant controverſy, may be gratified by conſulting the account of it in the life of lord keeper North by his brother the honourable mr. Roger North, and in the learned introduction to mr. Crompton's Practice of the King's Bench.

VI.——VII.——VIII.

On the ſixth tract I beg leave to obſerve, that though it was confeſſedly written from an alarm taken, leſt the king's bench, when lord chief juſtice Lee preſided, ſhould determine for the juriſdiction of that court by *latitat* over Wales; yet the event of the caſe alluded to did not wholly juſtify the apprehenſion. What the opinion is, which is ſaid to have laterly prevailed in favour of ſuch a juriſdiction, may be ſeen by conſulting the caſe of Perry and Jones, in mr. Douglas's Reports; as alſo how far it is countenanced by the Welch act of the 13. G. 3. c. 51.

On mr. Norbury's tract, which is the ſeventh article, it is proper to apprize the reader, that, by ſome manuſcripts in my poſſeſſion, he appears to have been a very ſtirring perſon againſt the abuſes of chancery during lord Bacon's adminiſtration of that juriſdiction; that he was the leading witneſs in the attack made upon the maſters of that time; and that I have a copy of the depoſition he made againſt them before a com-

a committee of the upper houſe of parliament. There is a great probability of his having been a practicer in chancery; but whether as a barriſter or not, I cannot now aſcertain: nor can I pretend to ſay, whether the ſpur to his activity was pure zeal, or a zeal mixed with perſonal intereſt or reſentment. There is certainly a conſiderable acrimony in the ſtile both of his tract and his depoſition. At the ſame time, it is due to him to acknowledge, that there are points in both, which deſerve to be remembered. They at leaſt may ſerve towards filling up one chaſm in the hiſtory of equitable juriſdiction; and as ſuch aſſiſt any, who ſhall hereafter think fit to inveſtigate the progreſs of that high and intereſting branch of Engliſh juriſprudence.

The eighth tract, which is a collection made by myſelf ſome years ago in the courſe of my profeſſion, I leave wholly to the mercy of the reader. If it ſhall ſerve on any occaſion to aſſiſt his ſearch after the authorities in our books on the effect of ſentences by one court when adduced in another, it is the utmoſt I can expect from ſuch a performance.

IX.

The ninth article of the volume I conſider as an important one.—It is an argument on a great and leading principle of the law of real property, which has been long the ſubject of ſuch warm controverſy, that in my private judgment it is eſſential to have the application of it rendered eaſy enough to be under the ready management of every Tyro in the profeſſion.—It comes from the hand of a great maſter in law; and though with all my admiration of its great author, I cannot yield to his claſſification of the rule in queſtion as flexible and ſubordinate; yet in almoſt every other point of view I am ſtruck with its excellence.—I was not preſent when it was publicly delivered; but I have often heard it admired as one of the beſt compoſitions, which had lately graced Weſtminſter-hall: and from the various notes of it which I had ſeen, before its author condeſcended to read it to me, (which favour was actually conferred upon me a ſhort time before his death) my expectations were highly raiſed. My poſſeſſion of it ſince the author's death was by purchaſe from the perſon, who derived his title from the worthy ſurviving executor of ſir William Blackſtone, under a ſale of the manuſcript, for the benefit of his eſtate, avowed to have been made with a view to publication.

cation.—Its being omitted in the printed volume of his reports will, without ſomething more, be inſufficient to prove, that ſir William meant to ſuppreſs it. The argument it is true was not in the judges note-book, having been written on a ſeparate paper.—But the report in the book, from which his note of Perrin and Blake in the printed reports is taken, applies to the caſe when argued in the king's bench, which was before he was made a judge: and as he could not then foreſee, that he was ever to give his opinion as a judge, nor could indeed know that he ſhould ever again have occaſion to introduce the caſe; the probability is, that no room was left in the note-book for its inſertion.—That it was not the intention of ſir William's executor *finally* to ſuppreſs it, is plain from his ſelling to one, whom he knew to be a purchaſer with a view to printing it. Nor is it clear to me, that any thing is to be inferred as to his *ever* having had ſuch an intention; becauſe it is probable, that the ſeparate paper had eſcaped obſervation, till it was too late to inſert it in the judge's printed reports; and I will remember, that I after the publication of them, under that impreſſion, wrote to mr. Cadell the bookſeller, to give notice to the executor of there being ſuch a manuſcript argument on a ſeparate paper, which probably was the firſt cauſe of its being attended to.—Beſides all this, thoſe, who are ſufficiently acquainted with my devoted reſpect for this late moſt eminent commentator on the laws of England, cannot reaſonably ſuſpect me of being eaſily betrayed into any meaſure tending to injure his fame. Often have I remonſtrated to various perſons, for whoſe opinions I have the higheſt reſpect, that, notwithſtanding the wonderful merit of that great work his commentaries, ſtill they were only elements of our law, only written for ſtudents, not deſigned for profound experienced lawyers, ſuch as are either the fixed ornaments of their country, on the elevated ſeats of juſtice, or move as ſhining though ſecondary planets in our juridical world. If the commentaries of mr. Blackſtone have attracted the attention of great judges and eminent counſel before ſufficiently enlightened; have been critically read and ardently ſtudied by perſons of ſuch deſcription; it is the ſtrongeſt poſſible proof of a commanding excellence: and though ſuch perſons ſhould find blemiſhes in every page, it will be at once obviated, by reminding them of the nature of the work, and of their unremitting condeſcenſion in examining its contents. Such is the point of view, in which I have ever conſidered theſe famous commen-

commentaries of an almoſt ſecond Hale. With ſuch extreme partiality for judge Blackſtone's writings, is it probable, that, for the ſake of ſwelling a volume too large without the aid of the few ſheets from the argument in queſtion, or for any other perſonal conſideration, I ſhould buy and publiſh the argument, if I did not ſee enough in it to prevent all injury to his fame?—Should even this large explanation not ſatisfy any of my readers, I have only to obſerve further, that, from the number of current notes of the argument in queſtion, concealment of its demerits, if the only error I impute to it ſhall deſerve ſo harſh an appellation, is a thing abſolutely impoſſible: and that it being ſo, it is ſurely more fit, that it ſhould come forth in its moſt perfect ſtate, than that it ſhould be tranſmitted to poſterity with thoſe additional imperfections, which neceſſarily belong to the beſt and moſt faithful note ever yet taken.

X.

The tenth article, though delivered by the editor as a ſpeech, was in truth a written argument in an equity cauſe, in the laſt ſtage of which his profeſſional aſſiſtance was required. Written ſpeeches, in the courts of juſtice, muſt ever coſt very great labour; ſuch, as with extenſive buſineſs at the bar, is abſolutely impracticable. Yet there are ſome nice points, both of law and equity, which, in reſpect of the extreme preciſion requiſite to a proper treatment of them, may be more ſatisfactorily elucidated in that way, than by the moſt brilliant energy of rhetorical eloquence. However I am forced to confeſs, that I had a more mortifying inducement for being thus prepared with written notes. Thoſe, to whom nature has denied her more rare and precious gifts, muſt be content with labouring to ſupply the deficiency from her niggardneſs, in the beſt manner their inferior reſources will allow.

XI.

The preſent volume cloſes with an effort made by the editor on an intereſting ſubject, which, as I have long perſuaded myſelf, is become involved in the veil of myſterious and dangerous uncertainty. For many years together I have opened my mind freely to a great number of eminent

eminent lawyers, with whom I have the honour of occasionally converſing. Many of theſe have often urged me to reduce my conceptions into writing; ſeemingly under a hope, that the reſult of my ſtudy of the ſubject would prove of real utility to the profeſſion. Notwithſtanding alſo the conſciouſneſs of my general inferiority, it has often ſtruck my mind, that in this one inſtance my elucidation, if I could but ſucceed in giving due force and order to my manner of conſidering the ſubject, might eradicate what I imagine to be current errors, or at leaſt ſemblances of errors; and that by conciliating both ſides in a long and famous controverſy into the ſame opinion, I might enſure the undiſturbed continuance of a rule of law, which I conſider as one of the great guards to the ſimplicity and conſiſtency of our ſyſtem in relation to real property. Till within theſe few months, however, I have not poſſeſſed reſolution enough to engage in an undertaking liable to a double objection:—the certain one of being arduous, becauſe the plaineſt truths, when once queſtioned, are often moſt difficult to be proved;—the probable danger of having my humble endeavours to effectuate a ſervice, for the uſe of the profeſſion of which I am proud to be a member, greatly miſunderſtood, and conſequently treated as both preſumptuous and invidious. But theſe objections at length failed of their effect; and a ſhort time ago I plunged into the enterprize, which my mind had ſo long meditated, and yet ſo long avoided. Scarce however had I compleated one half of the undertaking, before I fell once more under the apprehenſions of danger; by again recollecting, that to combat the error I had to contend with, was impracticable, without in ſome degree expoſing myſelf to the imputation of boldneſs in queſtioning the ſentiments of my ſuperiors. In conſequence alſo of this ſort of impreſſion, I at length reſolved to be ſatisfied for the preſent with an attempt to elucidate the *principle* of the rule in Shelley's caſe. My obſervations therefore terminate rather abruptly; and I reſerve a pointed application of the authorities, with an anſwer to the various objections likely to be oppoſed againſt my ideas of the rule, till I ſhall be able to ſee, how far the firſt part of my labors on this famous ſubject ſhall be acceptable. Should I never reſume the ſubject, the reader can have no great cauſe to complain of the deficiency; becauſe he may find it better ſupplied than moſt probably is within the compaſs of my beſt

exertions,

exertions, by reſorting to that profound book, the Eſſay on Contingent Remainders *: or ſhould an arrangement of the authorities, more particularly framed with a view to my repreſentation of the rule as *abſolute* and *imperative*, be neceſſary; I have reaſon to think, that my friend the continuator of the new edition of Coke upon Littleton † will take ſome opportunity of purſuing the ſubject where I have left it. If I did not believe, that the former of theſe gentlemen was poſſeſſed of candour proportionate to the greatneſs of his talents and learning, I ſhould have cauſe to doubt, whether he may not be diſpleaſed at ſeeing a rule, ſo zealouſly and ſucceſsfully defended by him, once more explored on principles in ſome reſpect ſeemingly more large and deciſive than thoſe to which he has appealed. With reſpect to the latter gentleman, it is a juſtice due from me here to confeſs, that for three or four weeks paſt, during which I have been much occupied in giving a finiſh to my obſervations on the rule in Shelley's caſe, he has kindly ſeized every opportunity of conferring with and aſſiſting me in putting my notions to a far ſeverer teſt, than they are expoſed to from any thing I have heretofore heard advanced by thoſe who are unfriendly to that rule.

The reader, I hope, will not be offended with the appellations of *enemies* and *friends* to the rule in Shelley's caſe. I gave into the uſe of thoſe appellations, merely to avoid circuity of expreſſion: nor is it in the moſt remote degree intended to inſinuate, that thoſe on either ſide of the controverſy are influenced by any other conſideration, than the deſire of ſettling the application of the rule in a manner moſt conſonant to the law of the land.

I ſhall be ſorry if it ſhould be queſtioned, whether there is any ſuch wonderful difference of opinions, or any ſuch embarraſſment about the rule as I have ſtated. For many years I have underſtood, that notwithſtanding the profuſion of caſes and learning on the ſubject; notwithſtanding even the great caſe of Perrin and Blake; there was ſtill adherent to the manner of reaſoning

* The ESSAY on REMAINDERS and EXECUTORY DEVISES, by Charles Fearne, eſquire.

† Charles Butler, eſquire, already mentioned.

reaſoning upon the rule ſuch an abundance of difficulties, as ſtill left it entrenched in a ſort of myſterious abſtruſeneſs: nor would it be difficult to prove this from the various notes of the opinions given by the judges in that very caſe; though I ſhall ever be exceedingly averſe to ſo invidious and pointed a remark, as ſuch an inveſtigation would neceſſarily lead into. Under this idea of ſubſiſting diſcord and embarraſſment, I projected to write my obſervations. Under the influence of the ſame idea I at length actually wrote them, in order to prove, that, taken in the true point of view, the rule in queſtion is, of all rules of law, one of the moſt ſimple and facile in application. At this very moment I remain under the ſame perſuaſion. If I am well founded, my ſuperiors, from whom in every other reſpect I ſtand ſo far removed, will I truſt diſdain to deny one ſingle error, rather than allow to me the ſingle merit of aſſiſting to exonerate the juriſprudence of the country from the reproach and other ill effects incident to it.

It may be ſaid perhaps, that there is no *novelty* in my manner of explaining the rule. My anſwer is, that it is *antiquity*, not *novelty*, which I aſpire to exhibit:—*remote antiquity*, reſcued from the ravages of *modern* ingenuity. When lord Coke heard Shelly's cauſe debated, it was not neceſſary to explore the foundations of the rule; becauſe all admitted its force; and the ſole queſtion was, whether the premiſes, on which only it can fairly operate, really exiſted in that caſe; namely, whether by *heirs male of the body*, there being a repetition of thoſe words ſuperadded, all the male iſſue *in infinitum* of the tenant for life was included, or only ſuch male iſſue as ſhould at the ſingle moment of his death anſwer to that deſcription. But far different has been the courſe of argument for almoſt a century back; for the rule has actually been argued, as if the queſtion was, whether it is convenient to a teſtator's deſign in point of effect to apply the rule; and thus a rule *imperative* to intention has been made almoſt a *ſlave* to it. Hence all the abſtruſeneſs, all the myſtery, all the profuſion of caſes and learning, all the endleſs ambiguities, which render a rule, the application of which ought to be as eaſy as the winding up of a watch, almoſt as difficult as the firſt invention of one. The diſcovery, if I have made one, is, that the rule has been diſguiſed by the learned ſuperinductions of

modern times; and that ſeen in its genuine antient garb it is ſimplicity itſelf.

Perhaps at laſt it may be ſaid by ſome, that the controverſy is merely *verbal*, and that all ſubſtantially mean the ſame thing.—Be it ſo.—I anſwer, that whatever may be the beſt denomination for the controverſy, if it really ſubſiſts in any form, the conſequential uncertainties ought to be obviated.

AUT CÆSAR AUT NULLUS was at one time made the motto to my obſervations on the rule in Shelley's caſe; becauſe it ſeemed to me ſhortly and emphatically to prepare the reader for my ſenſe of the rule. But a very ingenious barriſter *, the importance of whoſe Hiſtory of our Law lays the profeſſion under no light obligation, kindly ſuggeſted, that it might be miſinterpreted into a ſort of boaſt. Therefore upon cancelling the printed copies of the firſt ſheet of the Obſervations, I withdrew the motto, though I confeſs not without reluctance.—This is a ſmall circumſtance to take notice of; but it is recompenſed to myſelf, by the pleaſure I have in endeavouring to draw attention to a juridical Hiſtory of real value.

Scarce beyond one ſentence more remains for the concluſion of this long Preface.—As this volume was from the beginning deſigned for the uſe of the whole profeſſion of the law in all its branches, ſo it is now moſt reſpectfully preſented for their univerſal acceptance; with an entreaty, that the zeal, with which I have thus attempted to promote profeſſional knowledge, may receive from profeſſional candour and liberality a generous ſhelter for all my errors and imperfections, and perfect ſecurity againſt all kinds of harſh and invidious conſtruction.—Firſt looking up to our grave and reverend judges, I ſolicit indulgence from their dignity and wiſdom.—Next approaching to thoſe ſtars of eloquence and learning, which now enlighten and adorn our Engliſh forum, and which under that deſcription therefore will be as fully known as if each was here named, I feel aſſured even of too partial a countenance from their ſenſibility, from their elevation of mind; nay, in reſpect to ſome of them, from their friend-

* John Reeves, eſquire.

ſhip

ſhip.—Laſtly, ſurveying all the reſt, who are variouſly connected with the ſtudy and practice of Engliſh law, I derive hope of a favourable reception, from their general diſpoſition to encourage every individual of their community, whoſe labor of mind makes their accommodation its object.

Boswell Court,
Nov. 25, 1786.

FRA. HARGRAVE.

A

TREATISE,

IN THREE PARTS.

"PARS PRIMA.

"*De Jure Maris et. Brachiorum ejuſdem.*

"PARS SECUNDA.

"*De Portibus Maris.*

"PARS TERTIA.

"Concerning the Cuſtoms of Goods imported and exported."

FROM A

MANUSCRIPT of LORD CHIEF-JUSTICE HALE.

[The manuſcript, from which this treatiſe is printed, was part of the valuable preſent to the editor from GEORGE HARDINGE, Eſquire, Sollicitor-General to the Queen; for which acknowledgement is made in the preface to this volume. There cannot be the leaſt doubt of its being written by lord chief-juſtice HALE; though it is not in his hand-writing, but appears to be a fair copy by ſome tranſcriber. The contents agree with the article No. 20. and 21. in the liſt of lord chief-juſtice HALE's manuſcripts at the end of his life by biſhop BURNET. The title of the manuſcript is *verbatim*, as here given by the words between the marks of quotation.]

THE

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3. Concerning the manner of erecting of ports, and by whom it may be done.
4. Touching the title or origination of ports, by preſcription, patent, or charter.
5. Where the king may erect a port to the prejudice of another, and concerning reſtrictive clauſes in charters to ports.
6. Touching the threefold right in ports.
7. Concerning the *jus publicum* of ports and harbours.
8. Concerning the *jus regium*, or the king's right or prerogative in ports of the ſea.
9. Concerning the *jus regium* in ports of the ſea, in relation to commerce and trade.
10. Concerning the *jus regium* in the ports with relation to the cuſtoms.
11. Touching the officers of the cuſtoms attending the cuſtoms, the tronage or king's beam, and the coquet or certificate of cuſtoms paid.
12. Concerning the *five ports*; their names, privileges and charges.

PARS IIItia.

CAP. 1. The order and method of the whole diſcourſe.
2. Concerning prizage of wines, its nature, original, and progreſs.
3. Touching exemptions from prizage, and the tranſlation of the duty itſelf to a ſubject.
4. Concerning the cuſtomary duties that are or were anciently due in ports by uſuage or cuſtom.

5. Concerning the king's cuſtoms, and how they ſtood before the time of king E. I.
6. The narrative of the cuſtoms, and their ſeveral originals and alterations, as they ſtood in the time of king Edw. I.
7. The farther proſecution of the buſineſs of the cuſtoms in the time of king E. I.
8. Concerning cuſtoms, ſubſidies, and impoſitions, *temp.* Ed. II.
9. The proceedings touching ſubſidies, cuſtoms, and impoſitions, during the reign of king Edw. III.
10. The ſtate of the ſubſidies, cuſtoms, and impoſitions, during the reign of Rich. II.
11. Concerning the ſtate of the cuſtoms, ſubſidies, and impoſts of goods exported and imported in the time of Hen. IV.
12. Concerning the cuſtoms and ſubſidies of merchandizes *temp.* Hen. V.
13. Concerning the cuſtoms and ſubſidies of merchandizes *temp.* Hen. VI.
14. Concerning ditto *temporibus* Edw. IV. Rich. VII. Hen. VII. Hen. VIII. and Edw. VI.
15. Concerning ditto, and impoſitions *temporibus* q. Mary, q. Elizabeth, and k. James.
16. Concerning ditto, as they now ſtand *temp.* Cha. II.
17. A general ſcheme of the cuſtoms as they ſtood in the time of Edw. IV.
18. Concerning aliens and their cuſtoms, and the Hanſe merchants, &c.
19. Concerning aliens at large, and who are liable to alien's cuſtoms.
20. When cuſtoms and ſubſidies ſhall be ſaid to be due, and when not.
21. Concerning the entry of goods inwards and outwards, and how to be made.
22. What ſhall be ſaid a ſhipping to entitle the king to the ſubſidies, &c.
23. Concerning the times and places for lading and unlading of goods.
24. Touching repayment of cuſtoms or duties once paid upon emergencies.
25. Concerning the cuſtom of Newcaſtle coals, its original and progreſs.
26. A general diſcourſe touching the cuſtoms of cloaths, as well exported as ſold within the kingdom, and therein concerning alnage.
27. Concerning the ſubſidy of alnage.
28. Concerning things taken upon the ſea, letters of marque and repriſal.

PARS

PARS PRIMA.

De Jure Maris et Brachiorum ejuſdem.

CAP. I.

Concerning the intereſt of freſh rivers.

FRESH rivers of what kind ſoever, do of common right belong to the owners of the ſoil adjacent; ſo that the owners of the one ſide have, of common right, the propriety of the ſoil, and conſequently the right of fiſhing, *uſque filum aquæ*; and the owners of the other ſide the right of ſoil or ownerſhip and fiſhing unto the *filum aquæ* on their ſide. And if a man be owner of the land of both ſides, in common preſumption he is owner of the whole river, and hath the right of fiſhing according to the extent of his land in length. With this agrees the common experience.

Vide Mich. 18. 19. *Ed.* 1. *B. R. Rot. Nott.* in an aſſize by Robert Baker againſt Hugh Hercy for hindering his fiſhing in the water of Idell.

Juratores dicunt, quod prædictus Hugo non tenet prædictam piſcariam in ſeparali ſuo, ſimul cum Roberto Mortayn; quia dicunt, quod omnes, qui tenent terras abuttantes ſuper aquam illam, in ea piſcantur pro voluntate ſua uſque filum aquæ, ſicut illi de Grenely ex parte orientali, et illi de Stratford ex parte occidentali. Dicunt etiam, quod quædam pars villæ de Stratford eſt de feodo de Lancaſtria, abuttans ſe ſuper aquam prædictam, et ipſi de feodo illo piſcantur uſque filum aquæ. Hugo in Miſericordia.

And ſo it was accordingly agreed upon evidence, *Tr.* 2. *Jac. B. R. Owen et Dunch. Vide* 8. H. 7. 5. 22. Aſſ. 93. Raſtall's Entries 656, *et ſæpius alibi.*

But ſpecial uſage may alter that common preſumption; for one man may have the river, and others the ſoil adjacent; or one man may have the river and ſoil thereof, and another the free or ſeveral fiſhing in that river.

If a freſh river between the lands of two lords or owners do inſenſibly gain on one or the other ſide; it is held, 22. Aſſ. 93. that the propriety continues as before in the river. But if it be done ſenſibly and ſuddenly, then the ownerſhip of the ſoil remains according to the former bounds. As if the river running between the lands of A and B, leaves his courſe, and

ſenſibly makes his channel intirely in the lands of A, the whole river belongs to A; *aqua cedit ſolo:* and ſo it is, though if the alteration be by inſenſible degrees, but there be other known boundaries as ſtakes or extent of land. 22. Aſſ. pl. 93. And though the book make a queſtion, whether it hold the ſame law in the caſe of the ſea or the arms of it, yet certainly the law will be all one, as we ſhall have occaſion to ſhew in the enſuing diſcourſe.

But yet ſpecial cuſtom may alter the caſe in great rivers. For inſtance, the river of Severn, which is a wild river, yet, by the common cuſtom uſed below Glouceſter bridge, it is the common boundary of the manors of either ſide, what courſe ſoever the river takes; viz. the *filum aquæ* is the common mark or boundary, though it borrow great quantities of land, ſometimes of one ſide, ſometimes of the other, and gives them to the oppoſite ſhore.

Though freſh rivers are in point of propriety as before *primâ facie* of a private intereſt; yet as well freſh rivers as ſalt, or ſuch as flow and reflow, may be under theſe two ſervitudes, or affected with them; viz. one of prerogative belonging to the king, and another of public intereſt, or belonging to the people in general.

Of theſe in the enſuing chapters.

CAP. II.

Of the right of prerogative in private or freſh rivers.

THE king by an ancient right of prerogative hath had a certain intereſt in many freſh rivers, even where the ſea doth not flow or reflow, as well as in ſalt or armes of the ſea; and thoſe are theſe which follow.

1ſt. A *right of franchiſe* or *privilege,* that no man may ſet up a common ferry for all paſſengers, without a preſcription time out of mind, or a charter from the king. He may make a ferry for his own uſe or the uſe of his family, but not for the common uſe of all the king's ſubjects paſſing that way; becauſe it doth in conſequent tend to a common charge, and is become a thing of public intereſt and uſe, and every man for his paſſage pays a toll, which is a common charge, and every ferry ought to be under a public regulation; viz. that it give attendance at due times, keep a boat in due order, and take but reaſonable toll; for if he fail in theſe, he is fineable. And hence it is, that if a common bridge be broken, whereby there is no paſſage but by a boat or ferry, it hath been anciently practiſed in the

the Exchequer to compel that ferryman, that ferries over people for profit without a charter from the king or a lawful preſcription, to accompt for the benefit above his reaſonable pains and charge. *Communia Paſchæ*, 20. E. 3. *in Scaccario*. *Vide Clauſ.* 36. E. 3. *m.* 10. The bridge called Heckbeth bridge being in decay, neither was it well known who ſhould repair it; the king grants a temporary ferry and certain particular rates for paſſengers, appoints the profits to be taken in the firſt place for defraying of the charge of the barge and bargemen; and if it can appear who is by tenure to repair it, then ſurpluſage of the profits of the ferry to be anſwered to the king; and if that cannot be known, then *charitatis intuitu* the king allows it to the repair of the bridge.

And this, that is ſaid in reference to a freſh or private river, holds place much more in a public river or arm of the ſea; and therefore it need not be repeated when we come to that ſubject.

2dly. An *intereſt*, as I may call it, of *pleaſure* or recreation. Before the ſtatute of *Magna Charta* cap. 16. it was frequent for the king to put as well freſh as ſalt rivers *in defenſo* for his recreation; that is, to bar fiſhing or fowling in a river till the king had taken his pleaſure or advantage of the writ or precept *de defenſione ripariæ*, which anciently was directed to the ſheriff to prohibit riviation in any rivers in his bailiwick. But by that ſtatute it is enacted, *quòd nullæ ripariæ defendantur de cætero, niſi illæ quæ fuerunt in defenſo tempore Henrici regis avi noſtri, et per eadem loca et per eoſdem terminos, ſicut eſſe conſueverunt tempore ſuo.*

After this ſtatute the *Ripariorum defenſiones* ran thus, as appears *Claus.* 20. *H.* 3. *m.* 3. *dorſo*. *Claus.* 22. *H.* 3. *m.* 2. *dorſo, et ſæpius alibi.*

Rex Vicecomiti Wigorniæ ſalutem. Præcipimus tibi, quòd ſine dilatione clamari facias et firmiter prohiberi ex parte noſtrâ, ut nullus de cætero eat ad riviandum in ripariis noſtris in ballivâ tuâ, quæ in defenſo fuerunt tempore Henrici regis avi noſtri; et ſcire facias omnibus de comitatu tuo, qui ab antiquo facere debent pontes ad riparias illas, quòd provideant ſibi de pontibus illis, ita quòd prompti ſint et parati in adventu noſtro quando eis ſcire faciemus.

And thus it was written to moſt counties.

But becauſe this left the country in a great uncertainty in the writs of 22. H. 3. ſo afterwards it mentioned ſome one particular river;

Et *in alijs riparijs in ballivâ tuâ, quæ in defenſo eſſe conſueverunt tempore Henrici regis avi noſtri*;

As Avon in Worceſterſhire, Bladen in Oxfordſhire, Mules in Surrey, &c.

This

This hath been long diſuſed; for it created a great trouble to the country; and little benefit or addition of pleaſure to the king.

3d. An *intereſt of juriſdiction*; *viz.* in reference to common nuiſances in or by rivers; as where the ſewers were not kept, which gave the riſe to the commiſſion of Sewers, as well for freſh rivers as for ſalt. *Vide* Stat. 23. H. 8. cap. 5. The Commiſſion thereby enacted recites this part of the king's juriſdiction, viz.

"We therefore, for that by reaſon of our royal dignity and "prerogative royal we are bound to provide for the ſafety and "preſervation of our realm," *&c.*

And another part of the king's juriſdiction in reformation of nuiſances, is, to reform and puniſh nuiſances in all rivers, whether freſh or ſalt, that are a common paſſage, not only for ſhips and greater veſſels, but alſo for ſmaller, as barges or boats; to reform the obſtructions or annoyances that are therein to ſuch common paſſage: for as the common highways on the land are for the common land paſſage, ſo theſe kind of rivers, whether freſh or ſalt, that bear boats or barges, are highways by water; and as the highways by land are called *altæ viæ regiæ*, ſo theſe publick rivers for public paſſage are called *fluvii regales*, and *haut ſtreames le Roy*; not in reference to the propriety of the river, but to the publick uſe; all things of public ſafety and convenience being in a ſpecial manner under the king's care, ſuperviſion, and protection. And therefore the report in Sir John Davyes, of the piſcary of Ban, miſtakes the reaſon of thoſe books, that call theſe *ſtreames le roy*, as if they were ſo called in reſpect of propriety, as 19. Aſſ. 6. Dy. 11. for they are called ſo, becauſe they are of public uſe, and under the king's ſpecial care and protection, whether the ſoil be his or not.

And this leads me to the third chapter.

CAP. III.

Concerning public ſtreams.

THERE be ſome ſtreams or rivers, that are private not only in propriety or ownerſhip, but alſo in uſe, as little ſtreams and rivers that are not a common paſſage for the king's people. Again, there be other rivers, as well freſh as ſalt, that are of common or publick uſe for carriage of boats

boats and lighters. And theſe, whether they are freſh or ſalt, whether they flow and reflow or not, are *primâ facie publici juris*, common highways for man or goods or both from one inland town to another. Thus the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the ſea as below, and as well where they are become to be of private propriety as in what parts they are of the king's propriety, are publick rivers *juris publici*. And therefore all nuiſances and impediments of paſſages of boats and veſſels, though in the private ſoil of any perſon, may be puniſhed by indictments, and removed; and this was the reaſon of the ſtatute of *Magna Charta cap.* 23.

Omnes kidelli deponantur per Thamiſiam et Medwayam, et per totam Angliam niſi per coſteram maris.

Theſe kinds of nuiſances were ſuch, as hindered or obſtructed the paſſage of boats, as wears, piles, choaking up the paſſage with filth, diverting of the river by cutts or trenches, decay of the banks, or the like.

And they were reformed.

Sometimes by indictments or preſentments in the leets, ſeſſions of the peace, oyer and terminer, or before juſtices of aſſize.

Oftentimes in the king's bench; as *Hil.* 50. *E.* 3. *B. R. Rot.* 23. for nuiſances in the river of Trent; *H.* 23. *E.* 3. *B. R. Rot.* 61. in the river Ouſe; *H.* 21. *E.* 1. in the river Severn; *Tr.* 28. *E.* 3. *Rot.* 29. in the river Leigh; and generally in all other rivers within the bodies of counties, which had common paſſage of boats or barges, whether the water were freſh or ſalt, the king's or a ſubject's, *Rot. Parliamenti* 14. *R.* 2. *n.* 34. *Mich.* 36. *E.* 3. *B. R. Rot.* 65. *Mich.* 18, 19. *E.* 1. *B. R.* and infinite more.

Sometimes by ſpecial commiſſion; as for the river of Leigh, 19. Aſs. 6.

And ſometimes by the parties, that were prejudiced by ſuch nuiſance, without any proceſs of law.

More of this we ſhall ſee when we come to conſider of common nuiſances in havens and ports.

But if any perſon at his own charge makes his own private ſtream to be paſſable for boats or barges, either by making of locks or cutts, or drawing together other ſtreams; and hereby that river, which was his own in point of propriety become now capable of carriage of veſſels; yet this ſeems not to make it *juris publici*, and he may pull it down again, or apply it to his own private uſe. For it is not hereby made to be *juris publici*, unleſs it were done at a common charge, or by a publick authority, or that by long continuance of time it hath been freely devoted to a publick

publick uſe. And ſo it ſeems alſo to be, if he that makes ſuch a new river or paſſage doth it by way of recompence or compenſation for ſome other public ſtream that he hath ſtopped for his own conveniency; as in the caſe of the Abbot of St. Auſtin's Canterbury, mentioned in the Regiſter. So likewiſe if he purchaſeth the king's charter to take a reaſonable toil for the paſſage of the king's ſubjects, and puts it in ure, theſe ſeem to be devoting and as it were conſecrating of it to the common uſe. As he, that by an *ad quod damnum*, and licence thereupon obtained, changeth a way, and ſets out another in his own land; this new way is thereupon become *juris publici*, as well as a way by preſcription. For no man can take a ſettled or conſtant toll even in his own private land for a common paſſage without the king's licence.

CAP. IV.

Concerning the king's intereſt in ſalt waters, the ſea and its arms, and the ſoil thereof: and firſt, of the right of fiſhing there.

THUS much concerning freſh waters or inland rivers, which, though they empty themſelves mediately into the ſea, are not called arms of the ſea, either in reſpect of the diſtance or ſmallneſs of them.

We come now to conſider the ſea and its arms: and firſt, concerning the ſea itſelf.

The ſea is either that which lies within the body of a county or without.

That arm or branch of the ſea which lies within the *fauces terræ*, where a man may reaſonably diſcerne between ſhore and ſhore, is or at leaſt may be within the body of a county, and therefore within the juriſdiction of the ſheriff or coroner. 8. E. 2. *Corone* 399.

The part of the ſea which lies not within the body of a county, is called the main ſea or ocean.

The narrow ſea, adjoining to the coaſt of England, is part of the waſt and demeſnes and dominions of the king of England, whether it lie within the body of any county or not.

This is abundantly proved by that learned treatiſe of Maſter Selden called *Mare Clauſum*; and therefore I ſhall ſay nothing therein, but refer the reader thither.

In this ſea the king of England hath a double right, viz. a right of juriſdiction which he ordinarily exerciſeth by his admiral, and a right of propriety or ownerſhip. The latter is that which I ſhall meddle with.

The

The king's right of propriety or ownerſhip in the ſea and ſoil thereof is evidenced principally in theſe things that follow.

Iſt. The right of fiſhing in this ſea and the creeks and armes thereof is originally lodged in the crown, as the right of depaſturing is originally lodged in the owner of the waſt whereof he is lord, or as the right of fiſhing belongs to him that is the owner of a private or inland river. I ſhall not give many inſtances of this, becauſe they are abundantly done to my hand in the book I formerly cited.

Pat. 23. *E.* 1. *m.* 6. The king grants liberty to the Hollanders to fiſh *in mari noſtro prope Yernemuth.*

Rot. Parliamenti 3. *H.* 5. *pars.* 1. *n.* 33. The king by proclamation made a general inhibition of fiſhing upon the coaſts of Ireland to the prejudice of the Engliſh. Deſired to be recalled, but was not.

Rot. Parl. 8. *H.* 5. *n.* 6.

Item pry le Commons, que come noſtre Seigneur le Roy et ſes noble progeniteurs de tout temps ont eſtre Seigneurs de le mere, et ore per le grace de Dieu eſt ſi venus, que noſtre Seigneur le Roy eſt Seigneur de coſts de ambe parties de le mere d'ordeiner ſur touts eſtrangers paſſants permy le dit mere tiel impoſural oeps noſtre Seigneur le Roy apprendre que a luy ſemble reaſonable pur le ſalve gard del dit mere.

Reſponſio, "*Le Roy s'aviſera.*"

But though the king is the owner of this great waſt, and as a conſequent of his propriety hath the primary right of fiſhing in the ſea and the creekes and armes thereof; yet the common people of England have regularly a liberty of fiſhing in the ſea or creekes or armes thereof, as a publick common of piſcary, and may not without injury to their right be reſtrained of it, unleſs in ſuch places creeks or navigable rivers, where either the king or ſome particular ſubject hath gained a propriety excluſive of that common liberty.

Mich. 19. *E.* 3. *B. R. Rot.* 127. *Lincoln.* The commonalty of Grimſby impleaded the fiſhermen of Ole, which is within five miles of Grimſby, for lading and unlading their fiſh and other victuals at Ole;

Cuſtumâ non ſolutâ, quæ eſt debita dictæ villæ Grimſby juxta cartas regis contra prohibitionem regis.

The defendants plead,

Quòd ipſi ſunt liberi tenentes in hamletto de Thruſco, qui eſt infra præcinctum villæ de Ole, et quòd ipſi tanquam piſcatores juxta coſteram maris à tempore quo, &c. uſi ſunt piſcari cum retibus et battellis ſuis, et piſces captos ad terram apud Thruſco et alibi in patriâ illam venditioni exponere, abſque hoc quòd blada victualia bona ad mercimonia carcarunt aut diſcarcarunt aut venditioni expoſuerunt. Ideo veniat jurata.

Vide

Vide Statutum 2. *E.* 6. *cap.* 6. 5. *El. cap.* 5. *Bracton, lib.* 2. *cap.* 12. *Jus piſcandi omnibus commune in portu et in fluminibus.* It muſt be taken to be rivers, that are arms of the ſea, and *primo intuitu*; for *de facto* there doth fall out in many ports and arms of the ſea an excluſion of public fiſhing by preſcription or cuſtom.

IId. The next evidence of the king's right and propriety in the ſea and the arms thereof is his right of propriety to

The ſhore; and

The *Maritima Incrementa.*

(1.) The ſhore is that ground that is between the ordinary high-water and low-water mark. This doth *primâ facie* and of common right belong to the king, both in the ſhore of the ſea and the ſhore of the arms of the ſea.

And herein there will be three things examinable.

1ſt. What ſhall be ſaid the ſhore, or *littus maris.*

2d. What ſhall be ſaid an arm or creek of the ſea.

3d. What evidence there is of the king's propriety thereof.

1. For the firſt of theſe it is certain, that that which the ſea overflows, either at high-ſpring tides or at extraordinary tides, comes not as to this purpoſe under the denomination of *littus maris*; and conſequently the king's title is not of that large extent, but only to land that is uſually overflowed at ordinary tides. And ſo I have known it ruled in the Exchequer-chamber in the caſe of Vanhaesdanke on proſecution by information againſt Mr. Whiting, about 12. *Car.* 1. for lands in in the county of Norfolk, and accordingly ruled 15. *Car. B. R.* Sir Edward Heron's caſe, and *Paſch.* 17. *Car.* 2. *in Scaccario*, upon evidence between the Lady Wansford's Leſſee and Stephens, in an *ejectione firmæ* for the town of Cowes in the iſle of Wight. That therefore I call the ſhore, that is between the common high-water and low-water mark, and no more.

2. For the ſecond, that is called an arm of the ſea where the ſea flows and reflows, and ſo far only as the ſea ſo flows and reflows; ſo that the river of Thames above Kingſton and the river of Severn above Tewkeſbury, *&c.* though there they are publick rivers, yet are not arms of the ſea. But it ſeems, that, although the water be freſh at high water, yet the denomination of an arm of the ſea continues, if it flow and reflow as in Thames above the bridge.

22. *Aſſ.* 93. Nota *que cheſcun eaw, que flow et reflow, eſt appel bras de mere cy tantavint come il flow.*

3. For the third, it is admitted, that *de jure communi* between the high-water and low-water mark doth *primâ facie* belong to the king, 5. Rep. 107. Constable's case.

D. 26

Dy. 326. Although it is true, that ſuch ſhore may and commonly is parcel of the manor adjacent, and ſo may be belonging to a ſubject, as ſhall be ſhewn, yet *primâ facie* it is the king's.

And as the ſhore of the ſea doth *primâ facie* belong to the king, viz. between the ordinary high-water and low-water mark, ſo the ſhore of an arm of the ſea between the high-water and low-water mark belongs *primâ facie* to the king, though it may alſo belong to a ſubject, as ſhall be ſhewn in the next chapter.

In the caſe between the town of Newcaſtle and the prior of Tinmouth, 20. E. 1. which is afterwards, in the Second Part, chapter the 6th, more fully recited; one of the charges againſt the prior is, that he had built houſes at Sheles upon the river of Tyne between the high-water and low-water-mark. The prior pleads that it was built on his own ſoil.

Ubi dominus rex nullum habet ſolum, neque liberum tenementum, eo quòd ſolum dictæ domus et liberum tenementum extendit ſe uſque ad filum aquæ Tyne, ultra terram ſuam ſiccam, et inter quod quidem filum aquæ et terram prædictam domus prædicta habet piſcariam ſuam liberam in longitudinem terræ ejuſdem in eâdem aquâ.

The king's attorney replied,

Quòd, qualeſcumque manſiunculæ ibidem fuerunt temporibus prædeceſſorum prioris, idem prior, qui nunc eſt, tempore ſuo fieri fecit ibidem 26 domus ſuper ſolum quod domino regi eſſe debet, eo quòd fluxu et inundatione maris comprehenditur.

Afterwards judgment was given againſt the prior, but not in expreſs termes for the ſoil, but implicitly. See the judgment afterwards in the Second Part, 6th chapter.

And conſonant to this there was a decree *Paſchæ* 8. *Car.* 1. in the Exchequer, entered in the book of Orders of that Term, fol. 66. whereby it was decreed, that the ſoil and ground lying between Wapping-wall and the river of Thames is parcel of the port of London; and therefore and for that the ſame lies between the high-water and low-water marks of the river of Thames, all the houſes built between the Hermitage-wharfe unto Dickſhore eaſtward, and between the old wall of Wapping-wall on the north and the river of Thames on the ſouth, are decreed to the king; and the ſame were accordingly by commiſſion ſeized into the king's hands.

The title of the bill or information was laid, viz. 1ſt. That the river of Thames flowed and reflowed. 2d. That conſequently it was an arm of the ſea. 3d. That it was the king's river. 4th. That it was the king's port.—And upon all theſe it was concluded, that the land between the high-water and low-water mark was the king's land, and accordingly decreed.

And

And this ſhall ſuffice for the king's right in the ſhore of the ſea, or rivers that are arms of the ſea, viz. the land lying between the high-water and the low-water mark at ordinary tides.

(2.) The king hath a title to *maritima incrementa*, or increaſe of land by the ſea; and this is of three kinds, viz. 1. Increaſe *per projectionem vel alluvionem.* 2. Increaſe *per relictionem vel deſertionem.* 3. *Per inſulæ productionem.*

1. The increaſe *per alluvionem* is, when the ſea by caſting up ſand and earth doth by degrees increaſe the land, and ſhut itſelf out further than the ancient bounds went; and this is uſual. The reaſon why this belongs to the crown is, becauſe in truth the ſoil, where there is now dry land, was formerly part of the very *fundus maris*, and conſequently belonged to the king. But indeed if ſuch alluvion be ſo inſenſible, that it cannot be by any means found that the ſea was there, *idem eſt non eſſe et non apparere*; the land thus increaſed belongs as a perquiſite to the owner of the land adjacent.

2. The increaſe *per relictionem*, or receſs of the ſea. This doth *de jure communi* belong to the king; for as the ſea is parcell of the waſt or demeſne, ſo of neceſſity the land that lies under it, and therefore it belongs to the king when left by the ſea; and ſo alſo it regularly holds in lands deſerted by a river, that is an arm of the ſea or a creek of the ſea *primâ facie*, eſpecially if the creek or river be part of a port.

Clauſ. 10. *E.* 3. *m.* 18. Upon an inquiſition finding that half an acre in the ſuburbs of Canterbury.

Crevit in curſu ripæ Cantuariæ per alluvionem et diluvionem dictæ ripæ,

this half acre was ſeized into the king's hands. But it is true, it was afterwards reſtored to the Abbot of St. Auſtin's; becauſe by another inquiſition it was found,

Quòd non eſt ſolum noſtrum, nec accrevit per alluvionem et diluvionem dictæ ripæ, ſed extitit ſolum abbatis, &c. à tempore cujus memoria, &c.

Car. primi, Upon an information againſt Oldſworth and others for that which is now called Sutton Marſh, that 300 acres of land was *relictum per mare*, and that the defendants had intruded into it; the defendants pleaded ſpecially, and entitled themſelves by preſcription to the lands project by the ſea; and upon a demurrer adjudged againſt them. That 1ſt, by the preſcription or title made to lands project, which is *jus alluvionis*, no anſwer is given to the title of information for lands relict, for theſe were of ſeveral natures. 2d, It was held, that it lies not in preſcription to claim lands relict *per mare*;

mare; for ſo if the channel between us and France ſhould dry up, a man might preſcribe for it, which is unreaſonable; for *Nihil preſcribitur niſi quod poſſidetur.*

But this hath ſome exceptions, beſides theſe that follow in the enſuing chapter.

If a ſubject hath had by preſcription the property of a certain tract, or creek, or navigable river, or arm of the ſea, even while it is covered with water, by certain known metes or extents; this, though it ſhould be relicted, the ſubject will have the propriety in the ſoil relicted. For he had it before, though covered with water; and although the ſea is a fluid thing, yet the *terra* or *ſolum ſubjectum* is fixed; and by force of a clear and evident uſage a ſubject may have the propriety of a private river; though the acqueſt of the former be more difficult, and requires a very good evidence to make it out, as ſhall be ſaid in the enſuing chapter.

If a ſubject hath land adjoining the ſea, and the violence of the ſea ſwallow it up, but ſo that yet there be reaſonable marks to continue the notice of it; or though the marks be defaced; yet if by ſituation and extent of quantity, and bounding upon the firm land, the ſame can be known, though the ſea leave this land again, or it be by art or induſtry regained, the ſubject doth not loſe his propriety: and accordingly it was held by Cooke and Foſter, *M.* 7. *Jac. C. B.* though the inundation continue forty years.

If the mark remain or continue, or extent can reaſonably be certain, the caſe is clear.—Vide Dy. 326.—22. Aſſ. 93. See for this a notable caſe in the caſe of an overflowing by the Thames, which is an arm of the ſea, *Rot. Parliamenti* 8. *E.* 2. *m.* 23. *pro Willielmo Burnello.* Phillip Burnell, father of William, being ſeized of the manor of Haccheſham near Greenwich, died his heir within age during his minority.

Aqua Thamiſſæ magnam partem terræ et prati manerij prædicti ac aliarum terrarum contiguarum ſuperundavit.

The biſhop of Bath and Wells, by agreement with the king, was to ſtop the breach at his own charges, and was to hold the land for ſeven years to reimburſe his charges. This he did, and the land was regained, and the biſhop held the land for his ſeven years, and three years over them. Burnell deſired relief for his land in parliament againſt the Biſhop. The anſwer was,

Sequatur verſus epiſcopum ad communem legem;

which would not have been, if the king had been intituled by the inundation.

P. 18.

P. 18. *E.* 2. *Rot.* 174. *B..R.* upon the like account a conſiderable quantity of marſh ground, containing 100 acres, parcel of the manor of Stebunhith, was regained from the Thames, and enjoyed accordingly. I think it is the ſame that is now called Stepney Marſh, or at leaſt ſome part of the manor now built upon and contiguous to the Thames. The record is worth the reading, but long.

Claus. 18. *H.* 3. *m.* 21. *pro Villata de Shinberg* in Glouceſterſhire.

Rex Vicecomiti, &c. Quia accepimus per inquiſitionem, quam fieri precipimus, quòd illa pars terræ, quam utraque villata de Shinbridge et Aure ſibi vendicant, eò quòd aqua Sabrinæ eam occupavit ſuper campum de Shinberge verſus campum de Aure, et poſtea proceſſu temporis eam rejecit ad campum de Shinberge, antequam ſic rejecta eſſet per aquam Sabrinæ; de jure pertinuit ad villam de Shinbridge, et in parte fuit terra arabilis, et in parte paſtura, ad eandem villam de Shinbridge pertinens per diviſam foſſati, quod vocatur Hedgewood: precipimus tibi, quòd eidem villatæ de Shinberge plenam ſeiſinam de prædictâ parte terræ habere facias. Teſte Rege apud Glouceſteriam.

The river of Severn had gained upon Shinbridge ſo much, that its channel ran over part of Shinbridge lands, and loſt part thereof unto the other ſide, and then threw it back again to Shinberge. It ſhall not belong to Aure. Neither was it at all claimed by the king, though Severn in that place be an arm of the ſea. But it was reſtored to Shinberg as before.

But the truth is, that there the *maritima incrementa* of that river belong to the barons of Barclay, as ſhall be ſhewn. Yet the property of the ſoil was not loſt to the owners that had it before.

And the truth is alſo, that river, which is a wild unruly river, and many times ſhifts its channel, eſpecially in that flat between Shinberge and Aure, is the common boundary between the manors of either ſide, viz. the *filum aquæ*, or middle of the ſtream. And this is the cuſtom of the manors contiguous to that river from Glouceſter down to Aure, which was not taken notice of in that record. Yet it ſerves for this purpoſe to ſhew, that the king gained not the propriety againſt the town by ſuch inundation.

It is true, here were the old bounds or marks continuing, viz. the Hedgewood. But ſuppoſe the inundation of the ſea deface the marks and boundaries, yet if the certain extent or contents from the land not overflown can be evidenced, though the bounds be defaced, yet it ſhall be returned to the owner according to thoſe quantities and extents that it formerly had. Only if any man be at the charge of inning of it, it ſeems by a decree of Sewers he may hold it till he be reimburſed

reimburſed his charges, as was done in the caſe of Burnell before alledged. But if it be freely left again by the reflux and receſs of the ſea, the owner may have his land as before, if he can make it out where and what it was; for he cannot loſe his propriety of the ſoil, though it be for a time become part of the ſea, and within the admiral juriſdiction while it ſo continues.

3. The third ſort of maritime increaſe are iſlands ariſing *de novo* in the king's ſeas, or the king's armes thereof. Theſe upon the ſame account and reaſon *primâ facie* and of common right belong to the king; for they are part of that ſoil of the ſea, that belonged before in point of propriety to the king: for when iſlands *de novo* ariſe, it is either by the receſs or ſinking of the water, or elſe by the exaggeration of ſand and ſlubb, which in proceſs of time grow firm land invironed with water; and thus ſome places have ariſen, and their original recorded, as about Ravenſend in Yorkſhire.

And thus much of the king's right of propriety which he hath in the ſea, and alſo *primâ facie* and in common preſumption in the ports and creeks and armes of the ſea.

CAP. V.

The right which a ſubject may have in the creekes or armes of the ſea, and how it may be acquired.

ALTHOUGH the king hath *primâ facie* this right in the armes and creeks of the ſea *communi jure*, and in common preſumption, yet a ſubject may have ſuch a right.

And this he may have two ways.

1ſt. By the king's charter or grant; and this is without queſtion. The king may grant fiſhing within a creek of the ſea, or in ſome known precinct that hath known bounds, though within the main ſea. He may alſo grant that very intereſt itſelf, viz. a navigable river that is an arm of the ſea, the water and ſoil thereof. He may alſo grant a manor *cum littore maris eidem adjacente*; and the ſhore itſelf will paſs, though in groſs and not parcel of the manor. He may alſo grant a manor or land contiguous to the ſea, *unà cum maritimis accrementis*, and that will paſs that *jus alluvionis*, whereof before. *Vide Cartæ Antiquæ*, G. 15. Grant 6. *Johannis* to the abbot *de Bello loco*, viz. *alveum ſuper quem abbatia fundata eſt à vado de Hartford cum fluctu maris in aſcendendo et deſcendendo inter utramque ripam*.

Vide ibidem, I. 17. *Carta Willielmi primi abbati ſancti Auguſtini de totâ terrâ Eſtanore et totum littus uſque medietatem aquæ.*

Vide ibidem, Carta Knuti monachis ſancti Auguſtini de terrâ inſulâ Thanet, tam in terrâ quàm in mari et littore.

Vide ibidem, F. 17. A grant by king William the firſt to the monks of Trinity, Canterbury, of divers liberties in their poſſeſſions *in terrâ et in mari.*

Vide Cartæ Antiquæ, O. 1. A grant by Edward the Confeſſor to the abbey of Hulm, *videlicet, wreccum in mari et in littore maris et in portubus maris. Cartæ Antiquæ, D. D.* 24.

But it ſeems the grant of *incrementa maritima* will not paſs lands that often happen to be relict by the ſea; becauſe that is not ſo properly *maritimum incrementum.* And beſides, the ſoil itſelf under the water is actually the king's, and cannot paſs from him by ſuch an incertain grant as *maritima incrementa*; but it muſt paſs a preſent intereſt.

But if the king will grant land adjacent to the ſea *unà cum mille acris terræ aquâ maris coopertis cædem terræ ſecundùm conſuetudinem, &c. adjacentibus*; ſuch a grant, as it may be penned, will paſs the ſoil itſelf; and if there ſhall be a receſs of the ſea leaving ſuch a quantity of land, it will belong to the grantee.

2d. The ſecond right is that which is acquired or acquirable to a ſubject by cuſtom or preſcription; and I think it very clear, that the ſubject may by cuſtom and uſage or preſcription have the true propriety and intereſt of many of theſe ſeveral maritime intereſts, which we have before ſtated to be *primâ facie* belonging to the king. I will go over them particularly, and ſet down which of theſe intereſts are acquirable by uſage or preſcription by a ſubject.

A ſubject may by preſcription have the intereſt of fiſhing in an arm of the ſea, in a creek or port of the ſea, or in a certain precinct or extent lying within the ſea; and theſe not only free fiſhing, but ſeverall fiſhing.

Fiſhing may be of two kinds ordinarily, viz. the fiſhing with the net, which may be either as a liberty without the ſoil, or as a liberty ariſing by reaſon of and in concomitance with the ſoil, or intereſt or propriety of it; or otherwiſe it is a local fiſhing, that ariſeth by and from the propriety of the ſoil. Such are *gurgites*, weares, fiſhing places, *borachiæ ſtachiæ*, &c. which are the very ſoil itſelf, and ſo frequently agreed in our books. And ſuch as theſe a ſubject may have by uſage either in groſſe, as many religious houſes had; or as parcell of or appendant to their manors, as both corporations and others have had; and this not only in navigable rivers and armes of the ſea, but in creeks and

ports

ports and havens, yea and in certain known limits in the open ſea contiguous to the ſhore.

And theſe kinds of fiſhing are not only for ſmall ſea fiſh, as herrings, ſprats, pilchers, &c. but for great fiſh, as ſalmons, which, though they are great fiſh, are not royal fiſh, as the report of Sir John Davies in the caſe of the fiſhing of Banne would intimate. And not only for ſmaller fiſh, and ſalmons, but even royal fiſh, as whale, ſturgion, porpoiſe, which, though they are royal fiſh, and *primâ facie* and of common right do belong to the king, yet a ſubject may preſcribe even for theſe as appurtenant to his manor, as is unqueſtionably agreed by our books.

Now for precedents touching ſuch rights of fiſhing in the ſea and armes and creeks thereof belonging by uſage to ſubjects, the moſt whereof will appear to be by reaſon of the propriety of the very water and ſoil wherein the fiſhing is, and ſome of them even within the ports of the ſea.

P. 4. *E.* 1. *B. R. Surrey.*—The prior of Stoke brings treſpaſs for the fiſhing in *aquâ de Sturmer* againſt Hamon Clever. —The defendant juſtified, *quòd piſcavit in communi aquâ ipſius Hamonis ex parte comitatûs Suffolchiæ, ubi ipſe et anteceſſores ſui ſemper ſolebant piſcare.*—The prior *dicit, quòd Michael avus ipſius Hamonis dedit totum jus, quod dicebat ſe habere in piſcariâ mars de le Sturmer Deo et ſancto Johanni de Stoke, &c.*

P. 34. *E.* 1. *B. R. Rot.* 14. *Kancia.—Prior de Coningſhed implacitat abbatem de Furneys pro proſtratione gurgitis in aquâ de Ulverſtone.* The defendant juſtified; becauſe each end of the wear was faſtened upon the abbot's land. The abbot replies, *quòd Willielmus de Lancaſter dominus de Kendal dedit prædeceſſori domûs ſuæ prædictæ aquam et piſcariam ex utrâque parte ejuſdem quantum impetus maris fluit et refluit.*

Vide Raſtall's Entries, treſpaſs in piſcary, pl. 4. Preſcription pur ſeverall fiſhing *in aquâ maritimâ fluente et refluente in ſeiſonabili tempore cum 7 ſtallis ſeparatis ſeparalis piſcariæ fixis pro retibus.*

P. 35. *E.* 1. *B. R. Rot.* 18. *Suffolchiæ.—Willielmus Braham implacitat Riccardum S. et 7 alios pro piſcatione in ſeparali piſcariâ ſuâ apud Braham. Defendens dicit, quòd prædicta piſcaria eſt quoddam brachium maris et communis piſcaria eorundem et aliorum, et non ſeparalis piſcaria. Ideo veniat jurata.*

Whereby it is admitted, though *primâ facie* an arm of the ſea be in point of propriety the king's, and *primâ facie* it is common for every ſubject to fiſh there, yet a ſubject may have by uſage a ſeverall fiſhing there, excluſive of that common liberty which otherwiſe of common right belongs to all the king's ſubjects.

Trin. 10. *E.* 2. *B. R. Rot.* 83. *Norfolchiæ.* The abbot of St. Benedict Hulm impleads divers for fishing *in ripariâ, quæ se extendit à ponte de Wroxam usque quandam lacum vocatam Blackdam.*—Pending the suit the king's attorney came in, and alledged for the king, *quòd prædicta riparia est brachium maris, quæ se extendit in salsum mare, et est ripparia domini regis salsa fluens et refluens, ubi naves et battelli veniunt et applicant extra magnum mare carcati et discarcati quietè absque tolneto seu custumâ alicui dando, et est communis piscaria quibuscumque; et dicit quòd presentatum fuit in ultimo itinere coram Solomone de Roffa et socijs suis justiciarijs itinerantibus in comitatu isto, quod prædecessor prædicti abbatis fecit purpresturam super dominum regem in ripariâ prædictâ, gurgites plantando in eadem et appropriando sibi prædictam piscariam tenendo tanquam separalem; per quod consideratum fuit, quòd gurgites illæ amoverentur, et quòd prædicta aqua remaneret communis piscaria. Et petit, quòd non procedatur ad aliquam inquisitionem inde capiendam, quousque præfati justiciarij super recordo et processu prædictis certiorentur.* Thereupon search is granted, and the record certified. And afterwards a *procedendo* was obtained; and issue being joined, it was found for the abbot, and judgment and execution given against the defendants for the damages, viz. £.200.

Upon which record these things are observable.

1st. That *de communi jure* the right of such armes of the sea belongs to the king.

2d. That yet in such armes of the sea the subjects in general have *primâ facie* a common of fishing, as in the main sea.

3d. That yet a subject may have a separate right of fishing, exclusive of the king and of the common right of the subject.

4th. That in this case the right of the abbot to have a several fishing was not a bare right of liberty or *profit apprendre*; but the right of the very water and soil itself, for he made weares in it.

Escætria, 12. *E.* 1. *n.* 1. The earls of Devon had not only the port of Toppesham, *de quo infra*; but the record tells us, that *portus et piscaria et mariscus de Topsham spectat Amiciæ comitissæ Devon.*

Mich. 13, 14. *E.* 1. *B. R. rot.* 10. The abbot of Tichfend impleaded the burgesses of Southampton, *quòd diripuerunt gurgitem suam apud Cadeland. Burgenses respondent, quòd ipse gurges levata fuit ad nocumentum domini regis et villæ Southampt. et quòd batelli et naves impediuntur, quo minus venire non possint ad portum villæ prædictæ. Juratores dicunt, quòd à tempore quo, &c. non fuit ibi aliqua gurges, sed antiquitùs solebant stare pali, per quod*

quod credunt, quòd tunc fuit proſtrata gurges eâdem occaſione quâ modo, eo quòd fuit ad nocumentum tranſeuntium.

Upon which record theſe things are obſervable.

1ſt. That a ſubject may by preſcription have a wear in the ſea, and conſequently have an intereſt below the low-water mark; for probably weares be ſuch.

2dly, That, yet if it be a nuiſance to the paſſage of ſhips, it may be abated.

7th *Rep.* 15. It appears, that the abbot of Abbotſbury before diſſolution had not only a game of ſwans, but the fiſhing, yea and the ſoil of an arm or creek of the ſea called a meere or fleete, *in quam mare fluit et refluit*; and it came to the king by the diſſolution of the monaſtery.

And in many conſiderable armes of the ſea that were navigable rivers, and flowed and reflowed with ſalt water, divers perſons had weares and local fiſhing ſluices. As for inſtance, in the river of Severn the earls of Lancaſter had certain weares called Radley weares, part of his manor of Radley. *Clauſe* 10. *E.* 3. *m.* 29. The like for others in the river of Teſe, *Patentes* 32. *E.* 3. *pars* 1. *m.* 15. *dorſo in Twede, fines* 2. *E.* 3. *m.* 1. *in Trent. Pat.* 18. *E.* 2. *pars* 1. *m.* 3. *dorſo. Pat.* 43. *H.* 3. *m. dorſo in Severn. Pat.* 2. *E.* 4. *pars* 3. *m.* 15. *dorſo. Pat.* 32. *E.* 3. *pars* 2. *m.* 15. *dorſo in Oſe. Pat.* 12. *E.* 2. *pars* 1. *m.* 3.

Trin. 50. *E.* 3. *B. R. rot.* 2. *Eſſex. Walterius filius Walteri monſtrat domino regi, quòd cùm piſcaria vocata le Reyſand ab antiquo ut parcella manerij ſui de Burnham appendebat, dominus rex per cartam ſuam eam conceſſit durante minore ætate ſuâ cuidam Bartholomeo Stigoune, qui prædictam piſcariam detinet ad præjudicium et exhæredationem dictæ Walteri.* And thereupon a *ſcire facias* awarded. The defendant prayed aid of the king; and after a *procedendo* they plead to iſſue, and the jury find, that *dicta piſcaria eſt parcella manerij prædicti. Ideo conſideratum eſt, quòd prædicta piſcaria, cum gurgitibus eidem pertinentibus, dicto Waltero liberentur.*

Infinite more of this kind might be produced. I ſhall add no more here; but in the ſubſequent parts of this and the next chapter ſome other inſtances of this nature will occur, which be applicable to the preſcription of the right of fiſhing in navigable rivers; and I have added the more, becauſe there are certain glances and intimations in the caſe of the piſcary of Banne, in Sir John Davies's reports, as if the fiſhing in theſe kinds of royal rivers, were not acquirable but by ſpecial charter, which is certainly untrue; for they are acquirable by preſcription or uſage, as well as royal fiſh may be.

It

It is true, that by the ſtatute of *Magna Carta, cap.* 23. *Omnes kidelli deponantur de cetero penitùs per Thamiſiam et Medwayam per totam Angliam, niſi per coſteram maris.*

And this ſtatute was ſeconded with others that were more effectual, viz. 25. E. 3. cap. 3. 1. H. 4. 12. 12. E. 4. cap. 7.

And by force of theſe ſtatutes, weares, that were prejudicial to the paſſage of veſſels, were to be pulled down; and accordingly it was done in many places. But that did no way diſaffirm the propriety, but only remove the annoyance, which, as before is ſhewn, was not to be allowed in an inland river, if it be a common paſſage.

The exception of weares upon the ſea-coaſts, and likewiſe frequent examples, ſome whereof are before mentioned, make it appear, that there might be ſuch private intereſts not only in point of liberty, but in point of propriety, on the ſea-coaſt and below the low-water mark; for ſuch were regularly all weares. But as by the ſtatutes of 25. E. 3. cap. 4.—45. E. 3. cap. 2.—1. H. 4. 12.—4. H. 4. cap. 11. and other ſtatutes, the erecting of new weares and inhancing of old is provided againſt in navigable rivers; and by other ſtatutes particular proviſion is made againſt weares new or old erected in particular ports (as in the port of Newcaſtle, by the ſtatute of the 21. H. 1. cap. 18.; in the port of Southampton, by the ſtatutes of 11. H. 7. cap. 5. 14. H. 8. cap. 13.; in the rivers of Ouſe and Humber, by the ſtatute of 23. H. 8. cap. 18.; in the river and port of Exeter, by the ſtatute of 31. H. 8. cap. 4.; in the river of Thames, by the ſtatutes of 4. H. 7. cap. 15. 27. H. 8. cap. 18. 5. Jac. cap. 20. and divers others); ſo by the ſtatute of 3. Jac. cap. 12. all new weares erected upon the ſea-ſhore, or in any haven harbour or creek, or within five miles of the mouth of any haven or creek, are prohibited under a penalty. But in all theſe ſtatutes, though they prohibit the thing, yet they do admit, that there may be ſuch an intereſt lodged in a ſubject, not only in navigable rivers, but even in the ports of the ſea itſelf contiguous to the ſhore, though below the low-water mark, whereby a ſubject may not only have a liberty but alſo a right or propriety of ſoil. But yet this, that I have ſaid, muſt be taken with this allay, which I have in part premiſed.

1ſt. That this intereſt or right in the ſubject muſt be ſo uſed as it may not occaſion a common annoyance to paſſage of ſhips or boats; for that is prohibited by the common law, and theſe ſeveral ſtatutes before mentioned, viz. erecting new weares, inhancing old, fixing of pikes or ſtakes, and the like, in order to fiſhing: for the *jus privatum*, that is acquired to the ſubject either by patent or preſcription, muſt not prejudice the *jus publicum*, wherewith public rivers or armes of the ſea are affected for public uſe.

2d. That

2d. That the fiſhing, that a ſubject hath in this or any other private or public river, or creek freſh or ſalt, is ſubject to the laws for the conſervation of fiſh and fry, which are many.

And this gives me an occaſion to divert to the examination of thoſe commiſſions, that have been granted in common rivers, commonly called commiſſions of conſervancy or water-bailiffs; which commiſſions have of late time eſpecially been granted in all the great rivers in England, and under which the patentees have exerciſed a juriſdiction irregularly enough and to the damage of the people, and under the diſguiſe of a publick good have filled their own purſes with the money exacted from the people. Therefore touching their office,

1ſt. The office of a water-baillie or *ſcrutator* is a bare miniſterial officer, which the king doth or may appoint in thoſe rivers or places that are his in franchiſe or intereſt. And his buſineſs was, to look to the king's rights, as his wrecks, his floatſan, jetſan, water-ſtrays, royal fiſhes. And he had no juriſdiction at all *quâ talis*; but his office was only miniſterial, to receive and account for the caſualties belonging to the king upon public or great rivers, which did or in common preſumption might belong to the crown. Such was that office of ſearcher, *ſcrutator*, or baillie of the river of Severn *uſque ad pontem Wigorniæ*. *Pat.* 27. *H.* 6. *parte* 2. *m.* 20. *Pat.* 8. *E.* 4. *parte* 1. *m.* 22.

2d. The office of conſervator of rivers and fiſh in rivers; and of theſe patents of conſervancy we find mention in the ſtatute 1. El. cap. 17. And by a grant made to the city of London, and confirmed by the parliament of 17. R. 2. cap. 9. the conſervancy of the river of Thames from Stainſbridge down to Medway is granted to the mayor of London.

This office of conſervancy is of two kinds, or rather there are or may be two branches thereof.

1ſt. The conſervancy in order to nuiſances in rivers. This is grounded upon the ſtatute of 1. H. 4. cap. 12. whereby it is enacted, that there ſhall be commiſſions granted to ſurvey and keep the waters and great rivers, and to correct and amend the defaults. And this for Thames is annexed to the mayor of London alſo by the ſtatutes of 4. H. 7. cap. 15. 27. H. 8. cap. 18.

2d. The conſervancy in order to fiſhing. And this is that which is mentioned in the ſtatute of 1. Eliz. cap. 17. And this is grounded upon the ſtat. of Weſtminſter 2. cap. 47. which enacted, That the waters of Humber, Owſe, Trent, Dove, Aire, Darwent, Wherf, Niddiore, Swale, Teſe, Tyne, Ouſe, *et omnes aliæ aquæ in regno, in quibus ſalmones capiuntur,*

ponantur

ponantur in defenſo, &c. Et in partibus ubi hujuſmodi ripariæ fuerint, aſſignentur conſervatores iſtius ſtatuti, qui ad hoc jurati ſæpius videant et inquirant de hujuſmodi tranſgreſſoribus. Et in primâ tranſgreſſione puniantur per combuſtionem retium, &c. By the ſtat. 13. R. 2. cap. 19. the former ſtatute is confirmed, and the river of Thames added; and the rivers of Lone, Wyre, Merſe and Ribbell, and all other waters in the county of Lancaſter be put in defence as to the taking of ſalmons, &c. and in parts where ſuch rivers are, there ſhall be aſſigned and ſworn good and ſufficient conſervators of this ſtatute, as of the ſtatute of Weſtminſter.

But neither of theſe ſtatutes extended to any rivers but ſuch wherein ſalmon be. And inaſmuch as ſuch a commiſſion could not be without the warrant of an act of parliament, as is obſerved truly by my Lord Coke upon the ſtatute of Weſtminſter 2. cap. 47. conſequently their commiſſion cannot extend further than that act warrants, viz. to none but to thoſe that are particularly named, or at leaſt wherein ſalmon are.

By the ſtatute of 17. R. 2. cap. 9. the juſtices of the peace are appointed conſervators of theſe ſtatutes, except only as to the conſervancy of the river of Thames and Medway annexed to the mayor of London.

By the ſtat. of 1. Eliz. cap. 17. there is a farther and more extenſive proviſion againſt the deſtruction of other fiſh as well as ſalmon; and it limits, that the lord admiral, the mayor of London, lords of leets, &c. and all other perſons, &c. which by grant or other lawful ways or means lawfully have the conſervation or preſervation of any rivers, ſhall have power within the precincts of their lawful juriſdiction to inquire of, by the oaths of twelve men, and to hear and determine ſuch offences.

This indeed doth enlarge the power of theſe conſervators in reſpect of the offences, but not in reſpect of the limit of their juriſdiction.

Upon all this it follows,

1ſt. That theſe commiſſioners of conſervancy have no power in reference to fiſhing, but in ſuch places where ſalmons are in the rivers mentioned in the acts, though in thoſe rivers they have juriſdiction as to other fiſh as well as ſalmon; and that the conſervators have no power except in referrence to nuiſances in common or public rivers, and not in private nuiſances between party and party.

2d. Conſequently, not in the ſmall rivers that fall into thoſe rivers; for ſuch ſmall rivers as they, are not named in the acts of Weſtminſter 2. nor 13. R. 2. and they have not any ſalmons in them, and ſo not within their juriſdiction.

3d. But

3d. But yet in those rivers particularly named in the statutes of Westminster 2. and 13. R. 2. or in such rivers where salmons are, they have power to inquire of all offences contrary to the statute of 1. Eliz. because committed within the precinct of their jurisdiction.

4th. But then they must not convict nor fine men barely upon a presentment without a tryall; for such conviction without tryall is against law in any case, but a leete or swanmote court.

And therefore all those offences that are against the statute of 1. Eliz. within small rivers, are only punishable by the leete, or by the justices of the peace at their sessions, who are generall conservators by the statute of 17. R. 2. cap. 9. and not before these conservators by commission, except as to the offences in Thames, which are inquirable by the mayor of London.

And thus much by the way concerning conservatorships and water-baillies; and also concerning the right of fishing in the sea or armes thereof belonging to a subject, either by grant or prescription, either as a liberty or in respect of ownership of soil.

CAP. VI.

Concerning the ownership or propriety which a subject may have in the sea-shore and maritime increments, &c.

I Come now to those other parts of propriety which a subject may have by prescription or usage, viz. the sea-shore and maritime increases; which, though we have before stated to belong *primâ facie* to the king, yet they may belong to the subject in point of propriety, not only by charter or grant, whereof there can be but little doubt, but also by prescription or usage.

I. The shoar of the sea.

There seem to be three sorts of shoars, or *littora marina*, according to the various tides, viz.

(1st.) The high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoxials; and certainly this doth not *de jure communi* belong to the crown. For such spring tides many times overflow ancient meadows and salt marshes, which yet unquestionably belong to the subject. And this is admitted of all hands.

(2d.) The

(2d.) The ſpring tides, which happen twice every month at full and change of the moon; and the ſhoar in queſtion is by ſome opinion not denominated by theſe tides neither, but the lands overflowed with theſe fluxes ordinarily belong to the ſubject *primâ facie*, unleſs the king hath a preſcription to the contrary. And the reaſon ſeems to be, becauſe for the moſt part the lands covered with theſe fluxes are dry and maniorable; for at other tides the ſea doth not cover them; and therefore touching theſe ſhoars ſome hold, that common right ſpeaks for the ſubject, unleſs there be an uſage to entitle the crown; for this is not properly *littus maris*. And therefore it hath been held, that where the king makes his title to land as *littus maris*, or *parcella littoris marini*, it is not ſufficient for him to make it appear to be overflowed at ſpring tides of this kind. *P.* 8. *Car.* 1. *in Camerâ Scaccarii*, in the caſe of Vanheſdanke for lands in Norfolk; and ſo I have heard it was held, *P.* 15. *Car. B. R. Sir Edw. Heron's caſe, & Tr.* 17. *Car.* 2. in the caſe of the lady Wandesford, for a town called the Cowes in the Iſle of Wight, *in Scaccario*.

(3d.) Ordinary tides, or nepe tides, which happen between the full and change of the moon; and this is that which is properly *littus maris*, ſometimes called *marettum*, ſometimes *warettum*. And touching this kind of ſhoar, viz. that which is covered by the ordinary flux of the ſea, is the buſineſs of our preſent enquiry.

1ſt. This may belong to a ſubject. The ſtatute of 7. Jac. cap. 18. ſuppoſeth it; for it provides, that thoſe of Cornwall and Devon may fetch ſea-ſand for the bettering of their lands, and ſhall not be hindered by thoſe that have their lands adjoining to the ſea-coaſts, which appears by the ſtatute they could not formerly. *Vide Cartæ Antiquæ D. D. n.* 24. the charter of Alan de Percey to the monks of Whitby, and the bounds thereof, viz. *totam marinam à portâ de Whitby uſque Blowick, &c. et uſque Terdiſo, et uſque in mare, et per marinam in Whitby*, confirmed by king Henry I. And the bounds of that abbey's poſſeſſions take in many creeks of the ſea, yet are given by a ſubject, viz. Derwent, Muſe, Eſe, &c.

2d. It may not only belong to a ſubject in groſs, which poſſibly may ſuppoſe a grant before time of memory, but it may be parcell of a manor. And thus it is agreed 5. Reports, 107. in ſir Henry Conſtable's caſe, and the book of 5. E. 3. 3. cited accordingly. And according to this was the reſolution cited Dyer 316. to be between Hammond and Digges, *P.* 17. *Eliz.* And accordingly it was decreed in the Exchequer-chamber, *P.* 16. *Car. inter l'* Attorney Generall *et* ſir Samuel Roll, ſir Richard Buller, and ſir Thomas Arundell, *per omnes*

ſpar

barone. And the evidences to prove this fact are commonly theſe; conſtant and uſual fetching gravel and ſea-weed and ſea-ſand between the high-water and low-water mark, and licenſing others ſo to do; incloſing and imbanking againſt the ſea, and enjoyment of what is ſo inned; enjoyment of wrecks happening upon the ſand; preſentment and puniſhment of purpreſtures there in the court of a manor; and ſuch like.

And as it may be parcell of a manor, ſo it may be parcell of a vill or pariſh; and the evidence for that will be uſuall perambulations, common reputation, known metes and diviſions, and the like. And upon this account the parſon of Sutton about 14. Car. had a verdict for the tithes of Sutton-Marſh in Lincolnſhire, upon a long and a great evidence; though it appeared, that within time of memory it was the meer ſhoar of the ſea covered at ordinary tides, and without the old ſea-bank.

3d. It may not only be parcell of a manor, but *de facto* it many times is ſo; and perchance it is parcell almoſt of all ſuch manors as by preſcription have royal fiſh or wrecks of the ſea within their manor. For, for the moſt part, wrecks and royal fiſh are not, nor indeed cannot be well left above the high-water mark, unleſs it be at ſuch extraordinary tides as overflow the land: but theſe are perquiſites, which happen between the high-water and low-water mark; for the ſea withdrawing at the ebb leaves the wrecks upon the ſhoar, and alſo thoſe greater fiſh which come under the denomination of royal fiſh. He therefore that hath wreck of the ſea or royal fiſh by preſcription *infra manerium*, it is a great preſumption, that the ſhoar is part of the manor, as otherwiſe he could not have them. And conſonant to this is the pleading of Sir Henry Nevill's caſe, 5. E. 3. 3. and Raſtall's Entries 684. tranſcribed out of the record *M.* 14. *E.* 1. *Rot.* 432. where an abbot, preſcribing for wreck belonging to his manor, doth it in this form: *Ipſeque et omnes prædeceſſores ſui abbates monaſterii prædicti et domini ejuſdem manerii, per totum tempus prædictum, habuerunt, et habere conſueverunt, ratione manerii prædicti, omnimodo bona wreccata ſuper mare et ut wreccum ſuper terram projecta per coſteram maris in quodam loquo ubi mare ſecundùm curſum ſuum pro tempore fluxit et refluxit, à quodam loco vocato M. in parochiâ de L. &c.* And in the following plea, an abbot preſcribes to have *wreccum maris infra præcinctum manerii ſive dominii ſui projectum et floteſan maris infra præcinctum manerii deveniens, quodque prædictum dolium vini fuit wreccum maris per mare projectum ſuper littus maris apud S. infra præcinctum manerii ſive dominii illius.*

And

And with this agrees the Regiſter 102. Yet I find the earl of Cornwall had *wreccum maris per comitatum Cornubiæ*; and thereupon being queſtioned for wreck, adjudged, *quòd eat ſine die.* *P.* 14. *E.* 1. *minus B. R. Rot.* 6. *Cornubia.* But that was in a conteſt between the king and him; for poſſibly the inferior lords might have it by uſage againſt the earl.

Thus much I hold ſufficient concerning the ſhoar or ſpace between the high-water and low-water mark, which may belong to a ſubject and be parcell of his manor.

II. Let us now come to the *maritima incrementa*, viz.

Alluvio maris;
Receſſus maris; et
Inſula maris.

(1ſt,) For the *jus alluvionis*, which is an increaſe of the land adjoining by the projection of the ſea caſting up and adding ſand and ſlubb to the adjoining land, whereby it is increaſed, and for the moſt part by inſenſible degrees, Bracton, *lib.* 2. *cap.* 2. writes thus: *Item quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Eſt autem alluvio latens incrementum. Et per alluvionem adjici dicitur, quod ita paulatim adjicitur, quòd intelligere non poſſis quo momento temporis adjiciatur, &c. Si autem non ſit latens incrementum, contrarium erit, ut vis fluminis partem aliquam ex tuo prædio detraxit, et vicini prædio appulit, certum eſt eam tuum permanere, &c.* But Bracton follows the civil law in this and ſome other following places. And yet even according to this, the common law doth regularly hold at this day between party and party. But it is doubted in caſe of an arm of the ſea, 22. Aſſ. 93.

This *jus alluvionis*, as I have before ſaid, is *de jure communi* by the law of England the king's, viz. if by any marks or meaſures it can be known what is ſo gained; for if the gain be ſo inſenſible and indiſcernible by any limits or marks that it cannot be known, *idem eſt non eſſe et non apparere*, as well in maritime increaſes as in the increaſes by inland rivers.

But yet cuſtom may in this caſe give this *jus alluvionis* to the land whereunto it accrues.

This is made out very plainly by theſe enſuing records.

Communia Trin. 43. *E.* 3. *Rot.* 13. *in Scaccario*, which is that very record which is cited by Dyer 326. out of the book of Ramſey.—Proceſs went out againſt the abbot of Ramſey *ad oſtendendam cauſam, quare* 60 *acræ mariſci in manum regis non debent ſeſiri, quas abbas appropriavit ſibi et domui ſuæ ſine licentiâ regis, ſuper quâdam generali commiſſione de terris à rege concelatis et detentis. Abbas reſpondit, quòd ipſe tenet manerium de Brun-*

caſter,

caſter, quod ſituatun eſt juxta mare, et quod eſt ibidem quidam mariſcus, qui aliquando per in fluxus maris minoratur, aliquando per defluxus maris augetur, abſque hoc quòd appropriavit ſibi prout per præſentationem prædictam ſupponitur. And iſſue joined and verdict given for the abbot by *Niſi prius* before one of the barons. *Et judicium quòd eat ſine die, ſalvo ſemper jure regis.*

Though there were a verdict upon the iſſue, whether *appropriavit* or not, yet it is plain, that the title ſtood upon that which the abbot alledged by way of increment. And note, here is no cuſtom at all alledged; but it ſeems he relied upon the common right of his caſe, as that he ſuffered the loſs ſo he ſhould enjoy the benefit even by the bare common law in caſe of alluvion.

M. 23. *E.* 3. *B. R. Rot.* 26. *Lincolnia.*—The abbot of Peterborough was queſtioned at the king's ſuit for acquiring 30 *acras mariſci in Goſberkile, licentiâ regis non obtentâ.* The abbot pleaded, *quòd per conſuetudinem patriæ eſt et à tempore quo, &c. extitit uſurpatum, quòd omnes et ſinguli domini, maneria terras ſeu tenementa ſuper coſteram maris habentes, particulariter habebunt marettum et ſabulonem per fluxus et refluxus maris ſecundùm majus et minus prope tenementa ſua projecta. Et dicit, quòd ipſe habet quoddam manerium in eâdem villâ, unde plures terræ ſunt adjacentes coſteræ maris, et ſic habet per fluxus et refluxus maris circiter* 300 *acras maretti terras ſuas adjacentes, et per temporis incrementum ſecundùm patriæ conſuetudinem; et abſque hoc quòd ipſe perquiſivit, &c.* And upon iſſue joined, it depended many years before the iſſue was tried. But afterwards, *P.* 41. *E.* 3. *B. R. Rot.* 28. *Lincolnia, Rex.* viz. given, *quòd, ſecundùm conſuetudinem patriæ, domini maneriorum prope mare adjacentium, habebunt marettum et ſabulonem per fluxus et refluxus maris per temporis incrementum ad terras ſuas coſteræ maris adjacentes projecta, &c. Ideo abbas ſine die.*

Obſerve,

1ſt. Here is cuſtom laid, and he relies not barely upon the caſe without it.

2d. In this caſe it was *per incrementum temporis* and *per mare projecta.* It is not a ſudden reliction or *receſſus maris*, as I ſhall have occaſion to mention hereafter. And though there is no *alluvio* without ſome kind of reliction, for the ſea ſhuts out itſelf; yet the denomination is taken from that which predominates. It is an acqueſt *per projectionem* or *alluvionem*, not *per receſſum* or *relictionem.*

3d. That ſuch an acquiſition lies in cuſtom and preſcription; and it hath a reaſonable intendment, becauſe theſe ſecret and gradual increaſes of the land adjoining *cedunt ſolo tanquam majus principali*; and ſo by cuſtom it becomes as a perquiſite to the [illegible]s it doth in all caſes of this nature by the civil law.

2. Now

2. Now as touching the acceſſion of land *per recessum maris*, or a ſudden retreat of the ſea, ſuch there have been in many ages. Sometimes the ocean, eſpecially the narrow ſea lying between us and France and the Netherlands, leaves the Engliſh ſhore in a great conſiderable meaſure; poſſibly by reaſon of ſome ſuperinduation on the other eaſtern ſhore, or by ſome other reaſon we know not.

This acceſſion of land, in this eminent and ſudden manner by the receſs of the ſea, doth not come under the former title of *alluvio*, or increaſe *per projectionem*; and therefore, if an information of an intruſion be laid for ſo much land relict *per mare*, it is no good defence againſt the king to make title *per conſuetudinem patriæ* to the *marettum*, or *ſabulonem per mare projectum*; for it is an acqueſt of another nature. And this was accordingly adjudged, *H.* 12. *Car. Rot.* 48. in the caſe of the king againſt Oldſworth and others for Sutton Marſh, *in Scaccario*. And in that caſe it was likewiſe held and adjudged, that lands acquired *per relictionem maris* are not preſcribable, as part of a manor or as belonging to the ſubject; for that were to preſcribe, in effect, that the narrow ſeas to the coaſts of France or Denmark were part of a manor. In that caſe the information plea and judgment were in ſubſtance as followeth, viz.

Quod cùm 7000 *acræ mariſci ſalſi vocati Sutton Marſh, jacentes et exiſtentes juxta Sutton Long in comitatu prædicto, videlicet, inter Sutton Long et mare ad refluxum ejuſdem, fuiſſent parcella littoris marini, ac ad refluxus maris naturalis et ordinarios aquis ſalſis et marinis inundatæ: cùmque eædem* 7000 *acræ mariſci ſalſi nuper à mari, unde inundatæ fuiſſent, fuiſſent relictæ.* Then the information ſets forth a grant by king James under the great ſeal to Peter Aſhton and others, and a regrant by them by deed inrolled to the king, and that Michael Oldſworth, &c. intruded. The defendant Oldſworth came in; and as to part pleaded as tenant, viz. *quòd bene et verum eſt, quòd prædictæ* 7000 *acræ mariſci ſalſi vocati Sutton Marſh, jacentes et exiſtentes juxta Sutton Long, viz. inter Sutton Long et mare ad refluxum ejuſdem, fuerunt parcella littoris marini, et ad refluxus maris naturales et ordinarios aquis ſalſis inundatæ et à mari relictæ prout per informationem.* But he further ſaith, the king was ſeized in right of the duchy of the manor of Sutton, *et quòd plures terræ dicti manerii ante relictionem dictæ coſteræ maris adjacebant; et quod conſuetudo patriæ eſt et à tempore quo, &c. quòd domini maneriorum, terrarum, ſeu tenementorum ſuper coſteram maris adjacentium, particulariter habebunt marettum et ſabulonem per fluxum et refluxum maris ſecundùm majus et minus prope terras ſeu tenementa ſua projectum ſive relictum: quodque et prædictæ* 7000 *acræ mariſci ſalſi ad terram*

prædictam

prædict[illegible] parcellam manerii de Sutton adjacent, et per fluxus et refluxus [illegible] relictæ fuerunt à mari, et projectæ ad terram prædictam parcellam manerii de Sutton prædicti, ratione cujus relictionis prædictæ dominus rex fuit seisitus, &c. de prædictis 7000 acris in jure ducatûs, &c. And then he intitles himself by a grant under the duchy seal, and traverseth what he had not confessed. Upon this there was a demurrer and judgment for the king, upon solemn argument, and principally upon this reason, that custom cannot intitle the subject to relicted lands, or make it part of a manor: and it differed from the case of the abbot of Peterborough before cited; for there it was only *project*, but here [illegible]ded to the plea, that it might answer the inform[illegible] though the plea in the abbot of Peterborough's case was the precedent by which the plea was drawn, and with which it agreed, saving that addition of *relict*.

And yet the true reason of it is, because the soil under the water must needs be of the same propriety as it is when it is covered with water. If the soil of the sea, while it is covered with water, be the king's, it cannot become the subject's because the water hath left it. But in the case of *alluvio maris*, it is otherwise; because the accession and addition of the land by the sea to the dry land gradually is a kind of perquisite, and an accession to the land; and therefore, in case of private rivers, it seems by the very course of the common law, such a graduall increase *cedit solo adjacenti*; and though it may be doubtfull whether it be so *ex jure communi* in case of the king, yet doubtless it gives a reasonableness and facility for such right of *alluvio* to be acquired by custom; for though in every acquest *per alluvionem* there be a reliction or rather exclusion of the sea, yet it is not a recess of the sea, nor properly a reliction.

But this is to be carried along with us in the case of *recessus* or *relictio maris vel brachii ejusdem*; that where the land, as it stood covered with water, did by particular usage or prescription belong to a subject, there the *recessus maris*, so far as the subject's particular interest went while it was covered with water, so far the *recessus maris vel brachii ejusdem* belongs to the same subject.

The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath that propriety in the sea: but a subject hath not nor indeed cannot have that property in the sea, through a whole tract of it, that the king hath; because without a regular power he cannot possibly possess it. But though a subject cannot acquire the interest of the narrow seas, yet he may by usage and prescription acquire an interest in so much of the sea as he may reasonably possess, viz. of a

districtus

diſtrictus maris, a place in the ſea between ſuch pe[illegible], or a particular part contiguous to the ſhore, or of a po[illegible] creek or arm of the ſea. Theſe may be poſſeſſed by a ſubject, and preſcribed in point of intereſt both of the water and the ſoil itſelf covered with the water within ſuch a precinct; for theſe are maniorable, and may be entirely poſſeſſed by a ſubject.

The civilians tell us truly, *nihil præſcribitur niſi quod poſſidetur*. The king may preſcribe the propriety of the narrow ſeas, becauſe he may poſſeſs them by his navies and power. A ſubject cannot. But a ſubject may poſſeſs a navigable river, or creek or arm of the ſea; becauſe theſe may lie within the extent of his poſſeſſion aud acqueſt.

The conſequence of this is; that the [illegible]propriety relinquiſhed by ſuch armes of the ſea, ports, or creeks; nay, though they ſhould be wholly dried or ſtopped up; yet ſuch ſoil would belong to the owner or proprietor of that arm of the ſea, or river, or creek: for here is not any new acqueſt by the reliction; but the ſoil covered with water was the ſubject's before, and alſo the water itſelf that covered it; and it is ſo now that it is dried up, or hath relinquiſhed his channel or part of it.

And ſuch an acqueſt of a propriety in an arm or creek of the ſea may be as well within the precinct of a port, as without; and that, though the king or ſome other ſubject hath the port in point of franchiſe or privilege. For though the ſoil of all creeks and navigable rivers, eſpecially within ports, do *primâ facie* belong to the king in point of propriety as well as in point of franchiſe, yet the ſubject may have ſo great and clear a poſſeſſion of the ſoil lying under the water of that port, that it may belong to a ſubject in point of intereſt or propriety of the ſoil, though he have or have not the port in point of franchiſe: and conſequently, if the ſea ſhould relinquiſh the channell or creek or arm of the ſea within ſuch a port, it might and would belong to that ſubject, that had the propriety of the ſoil and water before it were ſo relicted.

And this is an exception out of that generality, poſſibly, that *terræ relictæ per mare* may not be preſcribed. But a certain creek, arm of the ſea, or *diſtrictus maris*, may be preſcribed in point of intereſt; and, by way of conſequence or concomitance, the land relicted there, according to the extent of ſuch a precinct as was ſo preſcribed, will belong to the former owner of ſuch *diſtrictus maris*. But otherwiſe it would be, if ſuch preſcription before the reliction extended only to a liberty, or *profit apprendre*, or juriſdiction only within that precinct; as liberty of free fiſhing, admirall juriſdiction, or the juriſdiction of a leet or hundred or other court; for ſuch may extend

to an arm of the sea, as appears by 8. E. 2. *Corone*; for those are not any acquests of the interest of the water and soil, but leave it as it found it.

Therefore the discovery of the extent of the prescription or usage, whether it extend to the soil or not, rests upon such evidences of fact as may justly satisfy the court and jury concerning the interest of the soil.

That which I have to say concerning creeks or havens or armes of the sea, and the propriety of them, will be contained in these following assertions.

1st, That a subject may, by usage or prescription, be owner or proprietor of such [redacted] arm of the sea, creek, or particular portion of the [redacted] contiguous to the shore, as is not a public port or haven; and consequently, if that part be left dry *per recessum vel obstructionem maris*, that will belong to that subject, that had that antecedent propriety when it was covered with water.

This will appear by the review of those cases that are in the precedent chapter concerning the right of fishing in the sea, many of which instances make it appear, that there may be a right of propriety in the soil *aquâ cooperta*, and the right of fishing resulting not as a *profit apprendre*, but upon the very right of the soil itself. And those instances, that follow in this chapter, will farther make out the propriety of the soil of such places as these compatible to a subject.

2d, That a subject having a port of the sea may have, and indeed in common experience and presumption hath, the very soil covered with the water; for though it is true, the franchise of a port is a differing thing from the propriety of the soil of a port, and so the franchise of a port may be in a subject, and the propriety of the soil may be in the king or in some other, yet in ordinary usage and presumption they go together.

If the king at this day grant *portum maris de S.* the king having the port in point of interest as well as in point of franchise, it may be doubtfull, whether at this day it carries the soil, or only the franchise; because it is not to be taken by implication. But surely, if it were an ancient grant, and usage had gone along with it, that the grantee held also the soil, this grant might be effectual to pass both; for both are included in it.

And so if by prescription, or custom a man hath *portum maris de S.* in ordinary presumption he hath not only the franchise, but the very water and soil within the port; for a *portus maris* is *quid aggregatum*, as a manor; and such a prescription may carry the soil as well as the franchise; and though this doth not always hold, yet most times it doth.

Escaetria 12. *E.* 1. *n.* 1. *Portus et piscaria et mariscus de Topsham spectant ad Amiciam comitissam Devon.* She had not only the franchise of the port, but the soil of the port, and the fishing and salt-marsh adjoining. *Vide infra*, when we come to the rights of ports.

And *vide infra, par.* 2. *cap.* 4. the case of the port of Plymouth, parcell of the manor of Trematon, wherein it will appear that a subject as he may be owner of a port in point of franchise, so he may be owner of the very soil of the haven in point of propriety. And see in the same chapter concerning the port of Poole. The earl of Surrey was owner of it in point of propriety as well as franchise, and had the anchorage of ships there, which seems to be ordinarily a perquisite in respect to the soil.

3d, That a man who is not owner of a port in point of franchise, but the franchise of the port belonging to the king, yet such a subject may by usage have the property of a creek or arm of the sea parcell of that port, and of the soil thereof; and may have upon that account the increases of land that happen by the recess of the water of that arm of the sea.

Register, 252. The prior of Christ Church *Cantuariæ* petitions the king, *quòd cùm quædam antiqua trenchea, quæ se ducit à brachio maris vocata A. versus villam de B. quæ est in solo ipsorum prioris et conventûs, per sabulones et arenam maris jam de novo taliter sit obstructa, quòd naves per trencheam illam usque ad dictam villam de B. venire nequeunt, ut solebant; et quædam alia trenchea, ducens ab eodem brachio maris usque ad eandem villam de B. jam vi maritimâ facta existet, per quam naves et batelli à mari usque ad villam illam commodè et sine impedimento poterunt transire.* An *ad quod damnum* issues to inquire, *si sit ad damnum vel præjudicium nostri aut aliorum, seu nocumentum dictæ villæ de B. si eis licentiam concedamus, quòd ipsi dictam antiquam trencheam omnino obstruere et commodum suum inde facere possint.*

Here the common passage for ships to a town admitted in point of propriety to belong to the prior, and that they may make profit of the soil being stopt up.

In Scaccario Car. upon the prosecution of Sir Sackville Crow, there was an information against Mr. John Smith, farmer of the lord Barclay, setting forth, that the river of Severn was an arm of the sea, flowing and reflowing with salt water, and was part of the ports of Glouceſter and Bristol, and that the river had left about 300 acres of ground near Shinbridge, and therefore they belonged to the king by his prerogative.

Upon not guilty pleaded, the tryal was at the exchequer bar, by a very substantial jury of gentry and others of great value.

Upon the evidence it did appear by unquestionable proof, that Severn in the place in question was an arm of the sea, flowed and reflowed with salt water, was within and part of the ports of Bristol and Glouceſter, and that within time of memory these were lands newly gained and inned from the Severn; and that the very channell of the river did within time of memory run in that very place where the land in question lies; and that

the

the Severn had deſerted it, and the channell did then run above a mile towards the weſt.

On the other ſide, the defendant claiming under the title of the lord Barclay alledged theſe matters, whereupon to ground his defence, viz.

1ſt. That the barons of Barclay were from the time of Henry the ſecond owners of the great manor of Barclay.

2d. That the river of the Severn *uſque filum aquæ* was time out of memory parcell of that manor.

3d. That by the conſtant cuſtom of that country, the *filum aquæ* of the river of Severn was the common boundary of the manors on either ſide the river.

When this ſtatute of the evidence was opened, it was inſiſted upon, that the river in queſtion was an arm of the ſea, a royal river, and a member of the king's port, and therefore lay not in preſcription to be part of a manor. But the court overruled that exception; and admitted, that even ſuch a river, though it be the king's in point of intereſt *primâ-facie*, yet it may be by preſcription and uſage time out of mind parcell of a manor.

Thereupon the defendant went to his proofs, and inſiſted upon very many badges of property or ownerſhip; as, namely,

That the lords of the manors adjacent to this river, and particularly thoſe of that manor, had all royal fiſh taken within the river oppoſite to their manor *uſque filum aquæ*:

That they had the ſole right of ſalmon fiſhing:

That they had all wrecks caſt between high-water and low-water mark:

That the lords of the manors adjacent had ancient rocks or fiſhing-places, and weares, or ſuch as were of that nature, within the very channell:

That they had from time to time granted theſe fiſhing-places, ſome by leaſe, ſome by copy of court roll at their ſeveral manors; by the names of rocks, weares, ſtaches, boraches, putts; and that they were conſtantly enjoyed, and rent paid by thoſe copy-holders and leaſe-holders:

That by common tradition and reputation, the manors on either ſide Severn were bounded one againſt another by the *filum aquæ*, and divers ancient depoſitions produced, wherein it was accordingly ſworn by very many ancient witneſſes:

That the increaſes happening by the reliction of the river were conſtantly enjoyed by the lords adjacent.

Theſe and many other badges were opened, and were moſt effectually made good by moſt authentical evidences and witneſſes. But before the defendant had gone through one-half of his evidence, the court and the king's attorney-generall ſir

John Banks, and the reſt of the king's counſell, were ſo well ſatisfied with the defendant's title, that they moved the defendant to conſent to withdraw a juror, which though he were very unwilling, yet at the earneſt deſire of the court and the king's counſell he did agree thereunto.

So that matter reſted in peace, and the lands being of the yearly value of two hundred pounds and better, are enjoyed by the lord Barclay and his farmers quietly and without the leaſt pretence of queſtion to this day. This I know; for I was thoroughly acquainted with this caſe, and attended at the bar at the tryall.

This great and ſolemn tryall for the right of a royall river, in a port and part of it, doth fully prove that which I have to ſay touching this matter.

But though the ſubject may thus have the propriety of a navigable river part of a port, yet theſe cautions are to be added, viz.

1ſt. That the king hath yet a right of empire or government over it, in referrence to the ſafety of the kingdom and to his cuſtoms, it being a member of a port, *prout inferiùs dicitur.*

2d. That the people have a publick intereſt, a *jus publicum*, of paſſage and repaſſage with their goods by water, and muſt not be obſtructed by nuiſances or impeached by exactions, as ſhall be ſhewn when we come to conſider of ports. For the *jus privatum* of the owner or proprietor is charged with and ſubject to that *jus publicum* which belongs to the king's ſubjects; as the ſoil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a publick intereſt of the people, which may not be prejudiced or damnified.

(3d.) As touching iſlands ariſing in the ſea, or in the armes or creeks or havens thereof, the ſame rule holds, which is before obſerved touching acqueſts by the reliction or receſs of the ſea, or ſuch armes or creeks thereof. Of common right and *primâ facie*, it is true, they belong to the crown, but where the intereſt of ſuch *diſtrictus maris*, or arm of the ſea or creek or haven, doth in point of propriety belong to a ſubject, either by charter or preſcription, the iſlands that happen within the precincts of ſuch private propriety of a ſubject, will belong to the ſubject according to the limits and extents of ſuch propriety. And therefore if the weſt ſide of ſuch an arm of the ſea belong to a manor of the weſt ſide, and an iſland happen to ariſe on the weſt ſide of the *filum aquæ* invironed with the water, the propriety of ſuch iſland will entirely belong to the lord of that manor of the weſt ſide; and if the eaſt ſide of ſuch an arm of the ſea belong to a manor of the eaſt ſide *uſque filum aquæ*, and an iſland happen between the eaſt ſide of the river and the *filum aquæ*, it will belong to the lord on the eaſt ſide; and if the

filum

filum aquæ divide itſelf, and one part take the eaſt and the other the weſt, and leave an iſland in the middle between both the *fila*, the one half will belong to the one lord, and the other to the other. But this is to be underſtood of iſlands that are newly made; for if a part of an arm of the ſea by a new receſs from his ancient channel incompaſs the land of another man, his propriety continues unaltered. And with theſe diverſities agrees the law at this day, and Bracton, *lib.* 2. *cap.* 2. and the very texts of the civil law. *Vide Digeſt. lib.* 41. *de acquirendo rerum dominio, legibus* 7, 12, 41, 29, 30, 38, 50, 56, 65. *et ibidem, lib.* 43. *tit.* 12. *de fluminibus, l.* 1. § 6. *Vide Bracton ubi ſupra. Habet etiam locum hæc ſpecies acceſſionis in inſulâ natâ in flumine, quæ, ſi mediam partem fluminis teneat, communis eorum eſt, qui pro indiviſo ab utraque parte fluminis prope ripam prædia poſſident, &c.* For the propriety of ſuch a new accrued iſland follows the propriety of the ſoil, before it came to be produced.

And thus much ſhall ſuffice to have been ſaid concerning theſe *incrementa maritima*, and how they may in point of propriety belong to a ſubject. It remains, that a few words be ſaid touching ſome other prerogatives, that have a cognation with this matter we are about, viz.

Wreck of the Sea; and
Royal Fiſhes;

which ſhall be the buſineſs of the next chapter.

CAP. VII.

Concerning the prerogative and franchiſe of wreck and its kinds, and royal fiſh.

AS touching wreck of the ſea, in the firſt place, it is ſometimes called *wreccum maris*, ſometimes *warettum*, which is ſometimes in records applied to the acceſſion of lands by alluvion. The record of the abbot of Peterborough, cited in the former chapter, is, *domini habuerunt warettum et ſabulonem.* Though I have uſed the word *warettum*, in the old French it is called wreck, and ſometimes *varech.*

The kinds of it are two, viz.

1ſt. Such as is called properly ſo, the goods caſt upon the land or ſhore.

2d. Improper for goods that are a kind of ſea-waifs or ſtray, *flotſon, jetſon* and *lagon.*—Of both theſe briefly.

I. Touching wreck of the ſea. It is not properly wreck, till it be caſt upon the ſhore or land; and therefore by the ſtatute of 15. R. 2.

R. 1. cap. 3. wreck of the ſea is declared to be determinable by the laws of the land, and not before the admirall in any wiſe; and it was one of the articles anciently within the inquiry and juriſdiction of the coroner. *Vide* ſtat. 4. E. 1. *officium coronatoris*, viz. concerning wreck of the ſea, whereſoever found; and if any lay hands on it he ſhall be attached by ſufficient pledges, and the price of the wreck ſhall be valued and delivered to the towns. This power was annexed to the coroner by the ſtatute of 3. E. 1. called Weſtminſter 1. And therefore as long as the goods are floating upon the ſea, they are not wreck; and according is the reſolution 5. Reports, ſir Henry Conſtable's caſe.

But all goods caſt upon the ſhore are not therefore *ipſo facto* wrecked ſo as to intitle the king or lord of a liberty to them; but it muſt have theſe qualities, viz.

1ſt. It muſt be ſuch goods or ſhip that is wrecked or periſhed at ſea. For if the goods were taken by pirates, and then they come or be brought or left upon Engliſh ground by any means, they are not wreck to be forfeit, but proviſion is made for reſtitution to the merchant by the ſtatute of 27. E. 3. cap. 13. And upon this account it ſeems, that reſolution of the judges is grounded, which is cited in the comment upon Weſtminſter 1. cap. 4. viz. that if enemies or pirates take a ſhip, and take out all the paſſengers and goods, and turn the hull to the ſea, and it is caſt upon the land, though no living thing come in her, ſhe is not wrecked ſo as to give the forfeiture. Yet though the law may be ſuch, the caſe, that is cited, warrants it not, which is *Clauſe* 5. *R.* 2. *m.* 24.; for there the mariners got all to land in Norfolk in the long-boat, and left the ſhip to the enemies, and ſo within the following rule.

2d. Though the ſhip or goods be wrecked and caſt upon the ſhore, yet if any living thing eſcape alive to land out of the ſhip, it is not ſuch a wreck as gives a forfeiture. And this was the ancient law before the ſtatute of Weſtminſter 1. cap. 4. as is reſolved and made evident by the reſolution of Conſtable's caſe, *ubi ſupra*, and the lord Coke's comment upon that ſtatute; for though the common law give the king *bona wreccata*, as ſhall be ſhewn; yet, becauſe it was *lex odioſa* to add affliction to the afflicted, it was bound up with as many limits and circumſtances and to as narrow a compaſs as might be.

3d. That theſe goods be caſt upon the ſhore or land, and not brought thither in a ſhip or veſſel. *Vide inter placita* Gerſey 2. et 3. E. 2. A ſhip was broken at ſea; and the goods floating in the high ſea, certain mariners took them up and put them on ſhipboard, and they came with their ſhip into the land of Geffry Carteret, who by charter had wreck of the ſea; and before he ſeized, the veſſel went to the ſhore of the abbot of Chirburgh,

who

who had likewiſe wreck. The goods being ſeized by the King's officer, theſe two interpleaded for the goods as wreck.

Et Willielmus le Mareis, qui ſequitur pro domino rege, dicit, quòd nullus eorum petere poſſit bona prædicta ut wreccum; quia dicit, quòd ea tantùmmodo ſunt wreccum, quæ fluctus maris projiciunt ad terram, vel infra portum, aut tam prope terram, quòd à ſtantibus in terrâ poſſunt perpendi, et ſic ducantur vel trahantur ad portum; ſed quæ reperta ſunt in alto mari, unde certum non exiſtit, quòd fluctus maris ea vellent projicere, ſi non per laborem marinellorum levantium à mari, et ponantur in napi vel batello, et ſic in vaſi ducantur ad terram et non tangunt terram alicujus pertrahentium, nec alio modo non poſſunt dici wreccum, ſed tantùmmodo de adventuris maris, de quibus nullus poteſt aliquid clamare, niſi ſalvatores et dominus rex, vel ille, cui rex conceſſerit libertatem percipiendi hujuſmodi adventuras. Et petit judicium pro domino rege, et prædicti, &c. non dedicere poſſunt. Conſideratum eſt, quòd prædicta vina remaneant domino regi, et prædicti Petrus et alij in miſericordiâ pro falſo clamore. Poſtea prædicta vina de prædictis doliis conceſſa ſunt prædicto priori pro 60s. de quibus ſolvit prædictis ſalvatoribus 40s. pro parte ſuâ, et de 20s. reſiduis reſpondet regi.

This, though it were a proceeding in Gerſey, who were heretofore and yet are guided by the cuſtoms of Normandy, yet even, theſe cuſtoms as to the point of wreck are very near if not altogether the ſame with thoſe of England, as appears by the 17th chapter of the *Grand Cuſtumier, de Varech.* And this reſolution above cited is conſonant to that of ſir Henry Conſtable's caſe, 5. Reports, though differing in terms and names.

And thus much of the nature of wreck, and this by the laws of England is forfeit; and the propriety of the firſt owner is, by the ſeizure of the king, or his officer, or lord of the liberty having his franchiſe, wholly diveſted.

But if goods are caſt upon the ſhore, though they have not all theſe properties, they may be ſeized by the king, or the lord that hath the liberty of wreck, and lawfully detained, till the right owner come and claim them, and make it appear that they are his; and the common law allowed him a year and a day for the making his claim. And therefore as to this alſo the ſtatute of Weſtminſter 1. cap. 4. was but an affirmance of the common law, as it ſeems; for the very ſame time is allowed for the claim of goods ſo ſeized by the *Cuſtumier* of Normandy.

And the time, from whence the day and the year is to be accompted, is from the time of the ſeizure, as apears by the comment upon that ſtatute; and if not claimed within that time, they were loſt.

But

But if there were a ſeizure by perſons that had no right to ſeize, the elapſe of the year and the day, as it is conceived, did not bar the right owners.

The ſtatute of the 27. Ed. 3. cap. 13. provides more expedition for the reſtitution of the merchant, where the goods are not lawful wreck; but it ſeems the generality of that ſtatute takes not away the loſs of the goods by non-claim by a year and day after ſeizure.

35. H. 6. 27. If goods of a common perſon be ſeized as wreck, if he claim not in a year and day, they are loſt; but if the king's goods were wrecked, he need not claim.

And *nota*, this claim is available only where the goods are caſt upon the ſhore, but they are not a legal wreck, as perchance ſome living thing eſcaped to the land. But where the goods are a legal wreck, this claim ſignifies nothing; for the goods are *ipſo facto* forfeit by being wreck and ſeized; for the proviſion of the ſtatute of 3. E. 1. as to the claim and proof within the year and day refers only to ſuch goods as are caſt upon the ſhore, but are not lawful wreck.

But yet in ſuch caſe, where the goods are not wreck in law, the merchant muſt allow ſalvage, or the charge that the taker up of the goods is at for their ſaving. *Pat.* 14. *E.* 4. *m.* 12. *dorſo.*

Thus much for the nature of wreck. Now concerning the propriety of it.

The ſtatute of *Prerogativa Regis*, cap. 11. tells us to whom wreck doth of common right belong in England. *Rex habebit wreccum maris per totum regnum, balenas et ſturgiones captas in mari vel alibi infra regnum, exceptis quibuſdam privilegiatis locis per regem.*

This was the common law before this ſtatute; and this ſtatute as to this point, and moſt if not all other points of prerogative in that ſtatute called *Prerogativa Regis*, is but declarative of the common law, and rather a repetition or collection of the king's prerogatives than any enacting law.

And the ſame was the prerogative of the duchy of Normandy, as appears in the *Grand Cuſtumier*, *cap. de Varech.*

See Spelman *in Gloſſario*, title *wreck*, ſeveral charters mentioned by king William the firſt, yea and by Edward the Confeſſor, of *wreck* and *jactura maris.*

King R. 1. in the ſecond year of his reign releaſed wreck through all England, as the ſame author cites it out of Hoveden. But his ſucceſſors reſumed the prerogative again, and that before the ſtatute of 17. E. 2. called *Prerogativa Regis*; and frequent inſtances thereof are long before that ſtatute in the times of E. 1. H. 3. and king John.

But

But though wreck of the ſea doth *de jure communi* belong to the king, yet it may belong to a ſubject.

1ſt. By charter; and this is without queſtion.

2d. By preſcription; and although this was doubted in the time of Bracton, yet the law is ſettled and unqueſtionable at this day.

Sometime wreck hath belonged to an honour by preſcription; as to the honour of Arundel, though the *caput baroniæ* were in the county of Suſſex; being another county from the place where the wreck aroſe. *T. 9. E.* 1. *B. R. Rot.* 20. *Eſſex.*

Sometime to the owner of a county. The lords of all counties palatines regularly had *wreccum maris* within their counties palatines, as part of their *jura regalia.* But yet inferior lords might preſcribe for wreck belonging to their ſeverall manors within a county palatine. The earl of Cornwall, which though it were not a county palatine it had many royalties belonging to it, had *wreccum maris per totum comitatum Cornubiæ*, viz. as againſt the king, though particular lords might preſcribe for it againſt the earl. *P.* 14. *E.* 1. *B. R. Rot.* 6. & 29. *Cornubiæ.*

And thus much concerning wreck, and the right of it.

II. Somewhat is fit to be mentioned concerning *flotſon*, *jetſon*, and *lagon*.

Theſe are not wreck of the ſea, but of another nature; neither do they paſs by the grant of *wreccum maris*, as is reſolved in that caſe of ſir Henry Conſtable, and the caſe of the 3 E. 2. where they are ſtiled *adventuræ maris.*

And as they are of another nature, ſo they are of another cognizance or juriſdiction, viz. the admirall juriſdiction.

The right of flotſon, jetſon, and lagon, and other ſea-eſtrayes, if they are taken up in the wide ocean, they belong to the taker of them, if the owner cannot be known.

But if they be taken up within the narrow ſeas, that do belong to the king, or in any haven port or creek or arm of the ſea, they do *primâ facie* and of common right belong to the king, in caſe where the ſhip periſheth, or the owner cannot be known; which is alſo one of the reſolutions of ſir Henry Conſtable's caſe. But if the owner can be known, he ought to have his goods again; for the caſting them overboard is not a loſs of his propriety.

Although the right of theſe adventures of the ſea within the king's ſeas belongs to him, where the owner cannot be known, yet the king hath little advantage of it; for by the cuſtom of the Engliſh ſeas, the one moiety of what is ſo gained belongs to him that ſaves it. And accordingly the cuſtom is recited in a letter by the king of England to the French king, *Clauſ.* 7. *E.* 3.

parte

parte 1. *membrana* 23. *verso*, to satisfy him of the usage, that if the merchants goods that are floating in the sea, be saved, though the merchant made out his property, yet the goods were usually divided, the one moiety to the merchant, and the other moiety to them that save them for salvage. But it seems by the statute of 27. E. 3. cap. 13. that hard custom was mitigated as to the merchant; and a reasonable amends allowed for salvage, according to the expence pains or adventure of them that saved it. But whether any thing hath altered that custom as to the king, I find not.

The other moiety of these *bona vacantia* taken upon the narrow seas was anciently, and I think at this day, taken by the admirall as his fee; which yet he takes *in jure regis*.

And this appears by the old articles of the admiralty entered in the black book of that court, wherein, though there be many extravagant articles, that no way belong to their jurisdiction, yet those that concern these things in question are good evidence what the usage was.

Among which this was one: *Item soit inquise de touts neifes vesseux et bateux, que sont troves waife sur le mere, dont l'admiral ne ad sa part à lui due d'office, c'est à dire la moity.*

And again: *Item soit inquise de touts ceux, que ont trove sur le mere floteſan tanne ou pipe de vyne ou doyle ou bales de madder drape coffres ou autres choses dont l'admiral ne ad sa part à lui due d'office.*

And thus much for the *jus commune* of these *adventuræ maris*.

But yet a subject may be intitled to these, as he may be intitled to wreck, viz.

1st. By charter.

2d. By prescription. And that is agreed in that case of sir Henry Constable, viz. that a man may have flotson, &c. by prescription between the high-water and low-water mark. Some of the west countrey prescribe to have it as far as they can see a Humber barrell. And much more may be had by prescription in an arm of the sea; and accordingly the barons of Barclay have ever had it in the river Severn, of the east side of the *filum aquæ*, over against their barony of Barclay.

These liberties of wreck, flotson, jetson, and lagon, and that also of royal fish, may be parcell of or belonging to an hundred. But enough of this.

Now touching royal fish, therefore called so, because of common right such fish, if taken within the seas parcell of the dominion and crown of England, or in any creeks or armes thereof, they belong to the crown; but if taken in the wide

sea,

ſea, or out of the precinct of the ſeas belonging to the crown of England, they belong to the taker. 39. E. 3. 35. *per* Belknap.

Touching the kind of theſe fiſhes that are called royal fiſh, there ſeem to be but three, viz. ſturgeon, porpoiſe, and *balæna*, which is uſually rendered a whale. *Clauſ.* 5. *R.* 2. *m.* 20. *de piſce vocato* whale *jam noviter ad terram in ſolo prioris de Merſe alienigenæ in manu regis exiſtente ad opus regis deferendo.*

But becauſe they may be great fiſh that come under no known denomination, we find the claim of ſuch under the name of *piſcis regius*, or ſometime *grand piſce*, without any certain denomination. *Vide Clauſ.* 20. *H.* 3. *m.* 3. *dorſo.* A controverſy between the king's bailiff and the prior of St. Swithen *de quôdam piſce regio* claimed by each without any diſtinct name. The prior procures the king's bailiff to be thereupon excommunicated, and the king commands his abſolution. But ſalmon or lamprey are not royal fiſh.

By the common right of the king's prerogative theſe belong to the king, if taken within his ſeas or the armes thereof.

Anciently the intire ſturgeon belonged not to the king; but only the head and the tail of the whale, according to Bracton, cited by Stamford upon this chapter of the prerogative.

According to the cuſtom uſed in the admiralty, theſe great fiſh, if taken in the ſalt water within the king's ſeas, they were divided, and a moiety was allowed to the taker, the other moiety to the admiral in right of the king: one of the articles of the admiralty above cited being, *Item ſoit enquiſe de ceux, que ont priſe ou trove ſur le mere whales, balens, ſturgeon, porpoiſe, ou grampiſe, dont l'admiral n'a ſa part pur le roy, c'eſt à ſcavoire la moitie.*

Where obſerve theſe two things:

1ſt. That theſe royal fiſh extended to other than whale and ſturgeon, viz. to porpoiſe, and *grampiſe*, or great fiſh.

2d. The admirall is to be anſwered for the king the moiety, which ſeems to expound Bracton as to the diviſion of the whale. The king had the head, and the queen the tail, which countervailed a moiety; and the taker had the body, which countervailed the other moiety.

Thus much for the right of the king to theſe royal fiſh.

A ſubject might and may unqueſtionably have this franchiſe or royal perquiſite,

1. By grant.

2d. By preſcription within the ſhore between the high-water and low-water mark, or in a certain diſtinct *diſtrictus maris*, or in a port or creek or arm of the ſea; and this may be had

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in groſs, or as appurtenant to an honour manor or hundred, as appears by infinite precedents and examples and books of the law.

And this ſhall ſuffice concerning the rights of the ſea and the creeks thereof according to the laws of England, as far forth as it is neceſſary to be known in order to what follows, viz. the havens ports and creeks of the ſea within the dominion of the crown of England, which ſhall be the buſineſs of the ſecond part of this diſcourſe, as a neceſſary *præcognitum* to the cuſtomes and right thereof according to the laws of England.

PARS

PARS SECUNDA.

De Portibus Maris.

CAP. I.

The method of the enſuing diſcourſe.

THE method that I propound to myſelf in the enſuing tract, is this.

I. I will conſider, what a port of the ſea is, and the differences of havens, roads, ports, and creeks.

II. The manner of the erection and creation and diſſolution of ports.

III. The manner of the tranſlation of ports to a ſubject.

IV. The hiſtory or narrative of certain particular ports, as Yarmouth, Hull, Newcaſtle, for the explaining of the right of ports.

V. The threefold rights that meet in all ports of the ſea.

(1.) *Jus privatum* of the port.

1ſt. In point of franchiſe.

2d. In point of propriety of the ſoil both in the land adjacent and in the ſea.

(2) *Jus publicum* of ports; and herein of the liberty of acceſs to and from ports; and of nuiſances.

1ſt. More reſtrained, that concern the town where the port is ſituate, viz. forſtalling and erecting houſes between the port and the ſea.

2d. More publick, and how redreſſed.

1ſt. Stoppage of the paſſage.

2d. Exactions of undue tolls or fees.

(3) *Jus imperii* or *regium*, and therein of what power by law there is of opening or ſhutting of the ports.

1ſt. In relation to the ſafety of the kingdom.

2d. In relation to the trade of the kingdom.

3d. In relation to cuſtomes; and herein of ſome port duties relative thereunto.

CAP.

CAP. II.

Touching the names of roads, havens, ports, and creeks. The nature of ports.

FOR the better explication of the nature of ſea-ports, we are to conſider ſome things and terms, that have cognation therewith, and the meaning of *portus maris*.

We find in common ſpeech four terms, that uſually occur in relation to the ſubject we have in hand, viz. a *road*, a *haven*, *a port*, and a *creek*.

A *road* is an open paſſage of the ſea, that receives its denomination commonly from ſome part adjacent; which though it lie out at ſea, yet, in reſpect of the ſituation of the land adjacent, and the depth and wideneſs of the place, is a ſafe place for the common riding or anchoring of ſhips; as Dover road, Kirkley road, Hung road.

A *haven* is a place of a large receipt and ſafe riding of ſhips, ſo ſituate and ſecured by the land circumjacent, that the veſſels thereby ride and anchor ſafely, and are protected by the adjacent land from dangerous or violent winds; as Milford haven, Plymouth haven, and the like. And theſe are ſome larger, ſome narrower. The ſmaller are ſometimes made or at leaſt helped by art; the greater are made only by nature.

A *port* is an haven, and ſomewhat more.

1ſt. It is a place for arriving and unlading of ſhips or veſſels.

2d. It hath a ſuperinduction of a civil ſignature upon it, ſomewhat of franchiſe and privilege, as ſhall be ſhewn.

3d. It hath a *ville* or city or borough, that is the *caput portus*, for the receipt of mariners and merchants, and the ſecuring and vending of their goods and victualling their ſhips. So that a port is *quid aggregatum*, conſiſting of ſomewhat that is natural, viz. an acceſs of the ſea whereby ſhips may conveniently come, ſafe ſituation againſt winds where they may ſafely lye, and a good ſhore where they may well unlade; ſomething that is artificial, as keys and wharfs and cranes and warehouſes and houſes of common receipt; and ſomething that is civil, viz. privileges and franchiſes, *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority.

A port of the ſea includes more than the bare place where the ſhips unlade, and ſometimes extends many miles; as the port of London anciently extended to Greenwich, in the time of King Edward the firſt; and Graveſend is alſo a member of

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the port of London; the port of Newcastle takes in all the river from Sparhauk to the sea; the like for the extent of Yarmouth, Bristol, &c.

The *caput portûs*, or town that gives its denomination, is sometimes unaccessible by ships or great vessels, but only by small vessels or lighters; and yet it gives the denomination to the port, and is the head of it. Thus Exeter is the *caput portûs*, yet no vessels of burthen come within four miles of it.

T. 33. *E.* 1. *rot.* 55. *Hibernia.* An inquisition is had touching the port of Dublin, *qui dicunt, quòd nullæ magnæ naves, carcatæ vinis seu aliis merchandisis, applicare possunt in portu Dublin, quousque in parte discarcantur, quòd ex consuetudine hactenus obtentâ hujusmodi naves carcatæ vinis in veniendo versus Dublin morari consueverunt apud Dalkey, et ibidem se ex parte discarcare; et vina sic discarcata per naviculas usque in civitatem Dublin ducere, absque aliquâ prisâ ibidem præstandâ, et similiter absque hoc quòd captor vinorum domini regis aliqua vina ibidem nomine prisarum signaret, et post hujusmodi discarcationem naves illæ cum residuis vinis suis applicare consueverunt apud Carnan, quæ est infra præcinctum prædictæ civitatis, et tunc captor hujusmodi prisarum pro suâ voluntate et electione capere consuevit prisam domini regis, vel de vinis sic in manibus prædictis relictis, vel de ipsis vinis priùs discarcatis, sive vina illa fuerint infra cellaria sive non, ita tamen quòd fiat nulla venditio de hujusmodi vinis, antequam prisa illa capta fuerit, sine licentiâ captorum prisæ illius.*

I have inserted the whole inquisition, because I shall hereafter use it to another purpose. But I use it here only to this end, to shew that the *caput portûs*, and which gives it the denomination, is not always the next place of great vessels. The like is seen also in the port of Bristol and divers others.

In respect of this extensiveness of a port beyond the vill that gives its denomination, if a thing be alledged to be done *in portu de Blakeney*, the *venire facias de vicineto portûs* is good, 7 H. 6. 22. But yet because the court cannot take notice *ex officio*, that it extends farther than the vill, a *venire facias de vicineto de Blakeney* hath in that case been ruled good.

And thus much in general for the signification and description of a port.

A *creek* is of two kinds, viz. creeks of the sea, and creeks of ports.

The former sort are such little inlets of the sea, whether within the precinct or extent of a port or without, which are narrow little passages, and have shore of either side of them. The latter, viz. creeks of ports, are by a kind of civil denomination such. They are such, that though possibly for their extent and situation they might be ports, yet they are either members of, or dependent upon other ports. And it began thus. The king could not conveniently have a customer and comptroller

comptroller in every port or haven. But theſe cuſtom-officers were fixed at ſome eminent port; and the ſmaller adjacent ports became by that means creeks, or appendants of that where theſe cuſtom-officers were placed.

The ſtate of the ports and creeks thereof upon this account at this day ſtand thus, viz.

LONDON *cum membris*;
London,
Blackwall,
Graveſend,
Lee.

SANDWICH *cum membris*;
Sandwich,
Deal,
Ramſgate,
Margate,
Milton.

FEVERSHAM;
Feverſham.

ROCHESTER *cum membris*;
Rocheſter,
Queenborough.

DOVER *cum membris*;
Dover,
Foulkſtone.

CHICHESTER *cum membris*;
Chicheſter,
Meecham,
Shoreham,
Newhaven,
Arundell.

RYE *cum membris*;
Rye,
Winchelſea.
Haſtings,
Pevenſey.

SOUTHAMPTON *cum membris*;
Southampton,
Portſmouth,
Goſport,
Longſton,
Lymington,
Hurſt Caſtle,
Upchurch,
Cowes,
Yarmouth.

POOLE;
Poole.

WEYMOUTH;
Weymouth.

LYME;
Lyme.

EXETER *cum membris*;
Exeter,
Apſham,
Tidcomb,
Sharecroſs,
Pouldram,
Sydmouth,
Auſterton.

DARTMOUTH;
Dartmouth.

BARNSTABLE *cum membris*;
Barnſtable,
Appledore,
Newke,
Biddiford.
Ilfordcum,
Clovelly,
Hartland,
Combmartin,
Watermouth.

BRIDGEWATER;
Bridgewater.

PLYMOUTH

PLYMOUTH *cum membris*;
Plymouth,
Saltash,
Fowey,
Truro,
Penryn,
Helford,
Penzance,
St. Ives,
Padstow,
Loo.

MINEHEAD;
Minehead.

CARDIFF *cum membris*;
Cardiff,
Penarth,
Newport,
Chepstow,
Llanelthy,
Penry,
Abarthare,
Swansey.

MILFORD *cum membris*;
Milford,
Carmarthen,
Tenby,
Morgan,
Cardigan.

ABERDOWY;
Aberdowy.

BRISTOL *cum membris*;
Bristol,
The Pill,
Uphill.

GLOUCESTER;
Glouceſter.

CHESTER *cum membris*;
Cheſter,
Neſſon,
Helbore,
Fradsham,
Beaumaris,
Conway,
Moſtin,
Baghill.

LIVERPOOLE;
Liverpoole,
Sanchbridge.

PRESULL;
Preſull,
Creeke.

CARLISLE;
Carliſle.

BERWICK;
Berwick.

NEWCASTLE *cum membris*;
Newcaſtle,
Sheels,
Blithnook,
Sunderland,
Hartlepool,
Stockton,
Whitby.

KINGSTON *cum membris*;
Kingſton ſuper Hull,
Scarborough,
Bridlington,
Grimſby,
Yorke.

BOSTON *cum membris*;
Boſton,
Saltfleet,
Spalding,
Wainefleet,
Foſſe-dike,
Sutton-marſh.

LYNN *cum membris*;
Lynn,
Heasham,

Heaſham,
Burnham,
Wiſbeach,
Croſſekey.

YARMOUTH *cum membris*;
Yarmouth,
Norwich,
Clye,
Leyſtoff,
Southold,
Aldborough,
Woodbridge.

IPSWICH *cum membris*;
Ipſwich,
Harwich,
Manytree.

COLCHESTER *cum membris*;
Colcheſter,
Wyvenhoe,
Blockhouſe,
Malden,
Burnham.

Thus ſtands the ſtate of the ports wherein there are cuſtomers and comptrollers; and the members or creeks of thoſe ports where there are none; but only theſe officers in the principal ports ſubſtitute ſervants to obſerve and take notice of goods exported and imported, to ſee that they agree with the entries they make at the principal ports. *Vide* ſtat. 4. H. 4. cap. 20. againſt unlading in creeks.

And by the ſtatute of the 1. El. cap. 11. no perſon is to land any goods in the ports of London, Southampton, Briſtoll, Weſtcheſter, and Newcaſtle, but at ſuch keys or wharfs there, as the queen ſhould appoint before September next; nor in any other port creek or haven, Hull excepted, but where a cuſtomer comptroller and ſearcher, or the ſervants of any of them, had been reſident by the ſpace of ten years laſt paſt, or ſhould thereafter be reſident, upon pain of forfeiture of the goods ſo landed; which was the greateſt and moſt effectual limitation and reſtraint of ports that could be, becauſe it left it in the king's power to reſtrain any other ports than thoſe that were then uſed for the unlading of goods.

And thus much in general for the nature of ports. More particulars will occaſionally emerge touching their nature in what enſues.

CAP. III.

Concerning the manner of erecting of ports; and by whom it may be done.

THIS kingdom is an iſland, and the ports of the kingdom are the gates, *oſtia regni*, as well in referrence to the exerciſe of trade, as in referrence to the ſafety and ſecurity of it againſt foreign enemies.

And every publick port is a franchiſe or liberty, as a market or a fair, and much more.

For

For, 1ſt. it is a place of common reſort of merchants and ſhipping, *arrivagium navium et batellorum*, within itſelf a franchiſe.

2d. And, ſecondly, every port had of neceſſity a market belonging to it, as well for the vent of merchandizes that were imported or to be exported, as for the vent of victualls and proviſion for the ſupply of mariners and victualling of ſhips; and therefore, if any did erect any victualling houſes between the port town and the ſea, it was puniſhable.

3. And, 3dly, to every publick port there were certain common tolls incident, as for wharfage and land-leave and the like, which by law cannot be taken without a lawful title by charter or preſcription. It was one of the articles in Eyre *de notis conſuetudinibus levatis in regno, ſive in terrâ, ſive in aquâ*; and therefore, *Paſ.* 11. *Car. B. R.* in the caſe of Morgan, againſt whom an information was preferred for taking certain rates for merchandizes unladen upon his own land at Crochampill near Briſtoll, it was reſolved, that though he might take amends for the treſpaſs in unlading upon his ground, yet he might not take it as a certain common toll; and for ſo doing he was convicted, and fined one hundred marks.

Upon all theſe conſiderations it is evident, that the king hath a ſpecial concern and intereſt in the franchiſe of a common port; and conſequently from hence it is evident,

(1ſt.) That no ſubject may inſtitute or erect a common port without the charter of the king or a lawful preſcription; and if he doth, the liberty or pretended liberty is ſeizable in a *quo warranto*, and the party that doth it is to be fined and to be adjudged, *quòd omnia ſigna portûs penitùs amoveat.* Thus it was done in the caſe of the prior of Tinmouth, 20. E. 1. the record whereof follows in the chapter where we come to ſpeak of the nuiſances of a port, and how remedied.

(2d.) As a ſubject cannot erect a publick port for all comers, ſo he cannot without a lawful preſcription or charter erect a port for the men of ſuch a fee or precinct, as for his own tenants.

Both theſe former aſſertions appear in the notable caſe of the ports of Waterford and Roſs, which though in Ireland, yet the law is the ſame there as in England as to this purpoſe.

Claus. 11. *H.* 3. *m.* 3. it appears, that the king granted to the earl of Penbroch ſuch a kind of reſtrained liberty of a port. *Rex conceſſit et licentiam dedit Willielmo comiti Mariſcallo, quòd naves de dominicâ terrâ ſuâ, cum mercandiſis in eis contentis, liberè expeditè et ſine impedimento veniant ad portum ſuum de Roſſe, et ibidem morentur, et inde recedant, dum tamen aliæ naves de terrâ dominî regis, et naves de aliis terris venientes in Hiberniam, eant*

et veniant ad portum de Waterford. Et mandatum eſt G. de Mariſcis, quòd naves de terrâ ipſius comitis ad portum ſuum venire permittat, et alias naves ad portum de Waterford.

Here was a reſtrained port not free to all; and the earl muſt have the king's charter before he could erect it. The earl, being a great prince in Ireland, and having gotten this footing, grafts upon it, and accroacheth the liberty of a common port for all comers; and thereupon there iſſued out of the chancery this enſuing writ, directed from the chancery in England to the *Juſticiarius Hiberniæ, viz. Clauſ.* 20. *H.* 3. *m.* 4. *Cùm villa noſtra de Waterford, ſicut audivimus, plurimùm deteriorata eſt per applicationem navium, quæ, omiſſo portu ejuſdem villæ, veniunt apud Roſſe et inſulam in terrâ G. Mariſcal, comitis Penbroch; mandaverimus eidem comiti, quòd nullæ naves in terrâ ſuâ prædictâ applicare debeant, niſi illi ſolùmmodo, qui fuit de terrâ ſuâ propriâ, et hoc de permiſſione noſtrâ: prohiberi facias, quòd naves aliquæ, niſi naves hominum ſuorum de terrâ ſuâ propriâ de cetero non applicent apud Roſſe, nec apud inſulam, per quod prædicta villa noſtra damnum incurrat; quòd niſi facere voluerint, per nos fieri faceremus, et idco vobis mandamus, quòd clamari facias, et firmiter inhiberi, nec aliqua navis, quæ non ſit de propriâ terrâ ejuſdem comitis, apud Roſſe vel inſulam applicare de cetero preſumat, ſuper forisfacturam noſtram; ſed magiſtri et marinarii tendent et occident cum navibus ſuis et mercandiſis uſq; Waterford ſi voluerint, et ibidem negotiari, ſicut ſeipſos volunt indemnes conſervare.*

And the like mandate almoſt *verbatim* iſſued by proclamation. *Pat.* 19. *E.* 1. *m.* 10. *dorſ.* But note, that afterwards there was a compoſition ſettled between the ports of Roſſe and Waterford, by the king's award. *Vide Trin.* 50. *E.* 3. *B. R. rot.* 19.

By this it appears,

1ſt. That the liberty of ſuch a ſpecial reſtrained port is not to be taken up without warrant by charter or lawful preſcription.

2d. That being granted, it cannot be enlarged to be a common port to all comers.

3d. Much leſs can ſuch a common port be uſurped without a lawful grant.

(3d.) But yet farther it ſeems, that a ſubject cannot, neither could by law at any time after cuſtoms were ſettled, arrive with cuſtomable goods and ſhip of his own at his own land, unleſs it had been a publick port where the king's officers for the collecting of thoſe cuſtoms were ſettled; for this were to defeat the king of his duty: and conſequently it ſeems, that not only the non-payment of the king's duties was puniſhable, but even the firſt application to his own port, whereby the king's officers were prevented

ed not only of the duty, but of the means of diſcovery of it. Puniſhable it was by fine, as a contempt or deceit to the crown; but no forfeiture of the goods could thereby accrue, till the ſtatute of the 1. El. cap. 11. had made a proviſion therein. And this ſeems to be reaſonably inferred upon the caſe of John de Britannia for the port of Little Yarmouth, ſet down at large in the enſuing fifth chapter, and the award of the king's council touching the ſame.

(4th.) But any man might bring and unlade his own private goods, which are not cuſtomable, in his own private ſhip or veſſel upon his own land, as fiſh taken by Engliſhmen; for this was no accroachment of a port at common law, and fiſh are excepted out of the ſtatute of 1. El. c. 11. And this may likewiſe be plainly collected by the decree of the king's councill made in the caſe of Little Yarmouth, hereafter mentioned.

In caſe of neceſſity, either of ſtreſs of weather, aſſault of pirates, or want of proviſions, any ſhip might put into any creek or haven, ſtat. 4. H. 4. c. 20. And though regularly the ports themſelves ought to find proviſions for ſhips and mariners, and ought not to be anticipated or foreſtalled therein, as ſhall be ſhewn; yet in caſe of neceſſity, or for the ſupply of fiſhermen, all places were as to that purpoſe and end ports. And this appears by the ſtatute of 31. El. cap. 7. againſt cottages, wherein are accepted ſuch cottages as are erected within a mile of the ſea, or upon the ſide of ſuch part of any navigable river where the admirall ought to have juriſdiction, ſo long as no other perſon ſhall therein inhabit but a ſailor, or man of manual occupation to or for making, furniſhing, or victualling any ſhip or veſſel uſed to ſerve on ſea.

And thus far we have conſidered, how far forth private ſubjects may or may not erect any port. But yet farther:

A lord of a county palatine, though he may have and uſually had ports by charter or preſcription, yet he cannot erect a common port within his palatine juriſdiction. And the reaſon is, becauſe the concernment of a port muſt neceſſarily exceed the extent and limits of his *jura regalia* that are incident to a county palatine; for the ſafety of the kingdom, the commerce of the kingdom, and the king's revenue, are concerned in it. Merchants and ſeamen of all parts and quarters of the world are let into the kingdom publicly, and under the publick protection in a publick port; and conſequently it is not within the extent of a juriſdiction palatine *de novo* to erect a publick port.

And now we have ſeen in whoſe power it is not to erect or create a port, it eaſily lets us ſee in whoſe power it is. It is a

part

part of the *jus regale* or royalty of the crown of England originally and *de novo* to erect publick ports in this kingdom. As all franchiſes within the kingdom are derived from the crown, either immediately and explicitly, as by new erection, grant, or charter; or preſumptively and conſequentially, as by cuſtom or preſcription; ſo in a ſpecial manner are the ports and the franchiſes thereof, which are *oſtia regni*.—And concerning the manner of the creation, erection, or inſtitution of a port, in the next chapter.

CAP. IV.

Touching the title or origination of ports by preſcription patent, or charter.

ALTHOUGH the more regular method were to begin with the origination of ports by charter or patent, becauſe that ſhews the firſt conſtitution of them; yet, becauſe it is more ſuitable to my deſign, I will begin with that which is by cuſtom or preſcription.

I have before intimated, and in the enſuing diſcourſe ſhall more diſtinctly ſhew it, that in the conſideration of a port there are theſe two things involved, viz.

1ſt. The conſideration of the intereſt of the ſoil both of the ſhore or town, which is the *caput portûs*, and of the ſoil of the haven itſelf wherein the ſhips do ride or apply.

2d. The conſideration of the intereſt of franchiſe, or the liberty itſelf; that civil ſignature which doth give the liberty of publick arrivage itſelf, which is in truth the *formale conſtituens* of a port, in a legal ſignification.

Both theſe are acquirable by preſcription, without any other formality appearing, though preſumed. *Ex diuturnitate temporis omnia præſumuntur ritè acta.*

By this title a port may without queſtion be ſettled in the crown; and indeed upon that account moſt of the ports of England, both in point of franchiſe and propriety of ſoil, are at this day lodged in the crown; as will eaſily appear in the peruſal of the catalogue of the ports and creeks of England before expreſſed, though moſt of them are now in farm to the towns of the ports.

And

And upon the ſame title and account they may be ſettled and lodged in the ſubject, as well in point of propriety of ſoil, as in point of franchiſe; and ſo were many ports of the ſea, which were enjoyed by ſubjects by the title of preſcription without any charter thereof extant, or at leaſt for moſt of them: and of this we ſhall give ſome inſtances.

In originali 3. *Ed.* 1. *libro rub.* 256. (which I ſhall have hereafter occaſion to uſe) it appears, that many ports were then held by ſubjects. *Et le roy ad graunt de la grace que toutes les ſeignioryes per qui ports lames on quiyres aient les forfeitures quant els avendront, cheſcun en ſon port, ſave au roy demy marke de cheſcun ſack de line et de pens et un marke de cheſcun laſt de quires.*

The earls of Cheſter had the port of Liverpoole as belonging to the county palatine of Cheſter, and poſſibly divers other ports within that earldom palatine, and had their priſage of wines. *Clauſ.* 40. *E.* 3. *m.* 22. *pro Stephano de Ward*, who was there by the king's writ diſcharged of priſage, becauſe formerly paid to the king for the ſame wines.

Inter placita parliamenti de tempore E. 1. the port of Milford did partly belong to the county palatine of Penbroch, which was the inheritance of that earl and Joan his wife, and partly did belong to the barony of Haverford weſt, then in the king's hands by certain metes and bounds. Remedy provided againſt the incroachments of the king's bailiff upon the earl's port.

The port of Hartlepoole did ſometime belong to Robert de Brus; for the record ſaith, *quòd Robertus de Brus habet mercatum et feriam apud Hartlepoole, et portum maris, et habet ibidem keelagium et priſam piſcis.* For the rebellion of Robert de Brus againſt the king, it ſeems the biſhop of Durham, who hath royal eſcheats within his county palatine, came to be owner of this port, and accordingly made title to it, and held it, and alſo priſage of wine within the ſame. *Communia Trin.* 6. *E.* 3. *in Scaccario.*

The port of Toppeſham belonged to the earl of Devon. *Eſcaeſt.* 12. *E.* 1. *n.* 1. *Portus et piſcaria et mariſcus de Toppeſham ſpectant Amiciæ comit. Devon.* It appears *m.* 3. *et* 4. *E.* 1. *coram rege, Rot.* 16. *Devon*, that there was a conteſt between the counteſs of Devon and the mayor and burgeſſes of Exeter, who had the port of Exeter in fee farm, touching certain uſurpations by them upon the counteſs at Toppeſham; and upon an iſſue joined a verdict given for the counteſs, viz. *Juratores dicunt, quòd Baldwinus de Riperiis, quondam comes Devon, et omnes anteceſſores ſui à conqueſtu Angliæ, et ſimiliter Amicia comitiſſa Devon, quæ manerium de Toppeſham tenet in dotem, fuerunt in ſeiſinâ, quòd mercatores ad prædictum portum venientes, pro voluntate ſuâ poterunt ad dictum portum de Toppeſham naves ſuas applicare, et mercaturas ſuas ibidem exonerare, et per particulas et in*

groſſo

groſſo vendere, et ibidem pernoctare, et cibaria ſua emere: ideò conſideratum eſt, quòd mercatores de cetero pro voluntate ſuâ poſſunt ad prædictum portum applicare et exonerare, &c. Et cives Exon in miſericordiâ, &c. et prædicta comitiſſa recuperet. damna triginț' libr.

Upon theſe records it appears,

1ſt. That the earls of Devon had the propriety of the ſoil of the port by preſcription; for they had all the profits that ariſe by reaſon of the property of ſoil, viz. the fiſhing and the ſalt marſh, which poſſibly might be an *incrementum maritimum.*

2d. They had alſo the franchiſe of the port by preſcription, and all the incidents thereof, viz.

1ſt. *Applicatio navium.*

2d. *Exoneratio navium.*

3d. *Mercatum et venditio mercandiſarum in groſs et per retail.*

4th. Victualling of mariners and ſhips.

5th. Lodging and entertainment of mariners.

All which are privileges in a ſpecial manner belonging to ports, and cannot be had without that liberty legally veſted; as ſhall be ſhewn in due time.

P. 10. *E.* 3. *B. R. rot.* 73. *dorſo*, it appears, that *Willielmus Denlarrena, comes Surrey*, had the port of Poole, and anchorage and other duties belonging to it.

It appears among the charters of the duchy of Cornwall, the tranſcripts whereof remain in the receipt of the exchequer, that *Rogerus de Valle-tortavantort* gave to Richard king of the Romans and earl of Cornwall, and the heirs of his body, *caſtrum de Trematon et* 59 *feoda militum in Cornwall et Devon, ad idem caſtrum pertin. ac etiam manerium de Trematon et villam de Eſſe cum aquâ.*

To this caſtle of Trematon belong a certain petty manor called Sutton-vantort, and alſo the water and port of Sutton: for ſo it appears by the cloſe roll, *Clauſ.* 17. *E.* 2. *m.* 14. *Sutton cum aquâ et portu ſpectat ad caſtrum de Trematon.*

By the death of Edmond his ſon without iſſue, the earldom and this caſtle came to the crown. Poſſibly Richard earl of Cornwall, after iſſue had, made ſome alienation before the ſtatute of Weſtminſter 2. whereby the reverſion to the heirs of Vantort was barred.

The earldom of Cornwall and this caſtle of Trematon deſcended to king Edward 3. He by charter in parliament grants the earldom of Cornwall to his eldeſt ſon, *et caſtrum et manerium de Trematon cum villâ de Saltaſh et parco ibidem cum aliis pertinentiis.* See the charter 8. Rep. 8. the Prince's Caſes.

By

By this grant, without any ſpecial mention of the water or port as belonging to it, the port and water of Sutton, now Plymouth, was annexed to the duchy of Cornwall; for though the charter grants *priſas et cuſtumas vinorum, necnon proficua portuum noſtrorum infra eundem comitatum Cornub. ſimul cum wrecco maris et balenâ et ſturgeone*, yet that did not extend to the water of Sutton, which was in Devon, but it paſſed by the ſtrength of its being parcell of and appendant to the caſtle of Trematon.

The town of Plymouth, which is indeed *caput portûs*, from whence the port now takes its denomination, was not part of Trematon, but built upon the manor of Sutton Prior, and was incorporated and its juriſdiction ſettled by act of parliament, *Rot. Parl.* 18. *H.* 6. *n.* 32. and confirmed by *Rot. Parl.* 3. *E.* 4. *n.* 45. But always in both, whatſoever was parcell of the manor of Trematon was excepted; and conſequently the haven itſelf, which was parcell of Trematon, was not annexed thereby to Plymouth, but ſtood upon the ſame foot of intereſt as before.

There lyes adjacent to this town, within the barbican there, a ſpace of about 30 acres, which is covered every tide with the ſea, and ſhips ride there and come to unlade at the keys of Plymouth, commonly called Sutton Poole; for the intereſt of the ſoil of thoſe 30 acres being parcell of the port, and information of intruſion was, as directed out of the exchequer-chamber, preferred againſt the mayor and commonalty of Plymouth. The defendants pretended title to it as parcell of the town of Plymouth, and ſhewed uſage to have had certain cuſtoms called land-leave, terrage, &c. But theſe referred to the ſhore rather than to the place in queſtion. They alledged it was alſo within the limits of their charter, and that they exerciſe juriſdiction of their courts there; both which were admitted. But it was inſiſted upon, that the ſoil itſelf was excepted, as parcell of the caſtle of Trematon; and divers other evidences were inſiſted upon for the town. On the other ſide it was ſhewed, that the king had uſed to have in right of his duchy in the place in queſtion anchorage, buſſelage, fiſhing and the rents of fiſhers, and divers other port duties that ſavoured of the ſoil; as appeared by divers accounts of the duchy, divers records mentioning *Pola de Sutton* was parcell of Trematon, ſeveral leaſes made by the king's progenitors of *Aqua et Pola de Sutton*, and ſome to the town itſelf or to ſome in truſt for them, and divers other weighty evidences for the propriety of the ſoil of Sutton Poole's being the very harbour itſelf, and belonging to Trematon; and accordingly a verdict given for the king, *M.* 16. *Car.* 2. *in Scaccario*, after ſeven years evidence.

I have mentioned this the rather; becauſe,

1. Here

1. Here the very intereſt of the port and water and ſoil and port duties themſelves were claimed and recovered by the crown; not upon any prerogative title, for if it had been ſo it would have paſſed to the town of Plymouth, being within the precincts of their incorporation and grant, and then the exception of Trematon had not been available; but as parcell of and belonging to a manor that was formerly a ſubject's.

2. Though the king *primâ facie* hath a right to ports of a royal franchiſe, yet the acceſſion of this manor to the crown did not ſever the intereſt of the port from the manor, no more than in caſe of a fair or market appendant by preſcription; for if by the acceſſion to the crown it had been divided from the caſtle or manor, it could not have paſſed without ſpecial words to the prince, as it plainly did here. As the port was by preſcription parcell of the caſtle of Trematon, ſo it continued parcell notwithſtanding the acceſſion thereof to the crown by the death of the earl of Cornwall without iſſue; and it paſſed together with the caſtle by the general grant of it, as a leet or market, or any other parcell or appendant; and ſo not like thoſe flowers of the crown which are rendered diſappendant by acceſſion to the crown, as waife, ſtray, &c. *V.* 9. *R. Caſ. Abbatis de Strata Marcella.*

Many more inſtances might be added of ports belonging in private manors to ſubjects by right of preſcription; and ſome other will occur in the neceſſary ſeries of the diſcourſe; as the caſe of John de Britannia for a port claimed belonging to the manor of Little Yarmouth, and the caſe of the archbiſhop of York for his port of Beverley and Hull. But of both theſe and ſome others in the following chapter.

And thus much of ports by preſcription.

Touching ports created by patent or charter, I mean the civil or legal port; for the natural ſituation and conveniency of creeks and ſhores for arrival of ſhips is due to nature, and the ſupplements to induſtry.

Ports are erected two ways:

1ſt. In the king's own demeſnes they may be erected barely by grant and proclamation; as the king uſually erects a fair or market in his own manor or town in this manner. *Rex vic. Eſſex ſalutem. Quia volumus quòd de cetero in perpetuum ſit unus portus communis pro arrivatione navium et exoneratione mercandiſarum apud villam noſtram; tibi præcipimus, quòd in pleno comitatu tuo proclamari facias, quòd de cetero in perpetuum omnes naves, cum bonis et mercandiſis et aliis rebus in eiſdem exiſtentibus, liberè et quietè veniant apud prædict. ac ibidem bona et mercandiſas ſuas exonerare et onerare poſſint ſine impedimento noſtro, hæredum vel ſucceſſorum noſtrorum, ſalvis nobis cuſtumis et aliis bonis inde debitis. T. R.*

If

If the liberty or erection of it be transferred or granted to another, it is done by patent or charter, and commonly alſo proclaimed in the county.

Vid. Pat. 1. *E.* 3. *par.* 1. *m.* 27. The exemplification of a charter of H. 2. whereby this liberty is granted in a few words, viz.

H. rex Angliæ, &c. omnibus archiepiſcopis, epiſcopis, &c. Sciatis me dediſſe et conceſſiſſe Willielmo de Albani pinsernæ noſtro, et hæredibus ſuis hereditariè, manerium de Snetiſham cum duobus hundredis et dimidio de Tredebury et Smethden cum wrech et cum omnibus pertinentiis ſuis, et miſteria de lunâ cum medietate fori et theoton et cum omnibus conſuetudinibus et portum cum applicatione navium, et leſtop et viam ipſius aquæ et tranſitum, cum omnibus querelis, &c.

Cart. antiq. Cl. 7. *H.* 2. grants to the abbot of Whitby *portum maris cum toll et team, et cum omnibus libertatibus et conſuetudinibus ad portum maris pertinentibus, viz. apud Whitby.*

Vide ibidem D. D. n. 5. King William the firſt grants to the ſame abbey *portum maris cum algâ per totam ſuam terram. Alga* is expounded to be *wreccum. Vid. ibidem D. D.* 26.

Car. antiq. fol. 17. king William the firſt confirms to the monks of Trinity *Cantuar. portum de Sandwico, et omnes exitus et conſuetudines ex utrâq; parte aquæ, ſicut rex Edmundus eos antea dedit.* But *nota*, the archbiſhop recovered this port and the cuſtoms thereof upon the charter of king Knute.

In ſome, but eſpecially in latter times, the charters granting new ports are more large and certain, expreſſing the bounds of the port.

The king may grant a port general, as before, or a reſtrained port, viz. for ſuch as are of the fee of the grantee, as in the caſe of Roſſe before mentioned.

More ſhall be ſaid concerning the erection of ports by patent, and the clauſes of reſtriction that are ſometimes in them, in the next chapter.

CAP. V.

Where the king may erect a port to the prejudice of another; and concerning reſtrictive clauſes in charters to ports.

IF the king erect a market by charter and grant it over, or if a man have a market by preſcription, if the king erect another market at ſuch a diſtance and at ſuch a time as is a nuiſance and prejudice to another market, the firſt grantee or owner of a market may have an action upon the caſe againſt the ſecond grantee,

grantee, if he hold that market; for as to him the patent is void, neither ſhould it have been granted without an *ad quod damnum* precedent, and an inquiſition returned that it is not *ad damnum*.

But it ſeems the law is otherwiſe in the caſe of a port. If *A.* hath a port in *B.* and the king is pleaſed to erect a new port hard by that, which it may be is more convenient for merchants; tho' it be a damage to the firſt port, ſo that there be no obſtruction of the water or otherwiſe, but that ſhips may if they will arrive at the former port, this it ſeems may be done. But then this new port muſt not be erected within the precincts of the former. The reaſon of the difference between it and a market are evident, viz. becauſe that a port is of concernment to the whole trade of the kingdom, and alſo to the defence of the kingdom, the increaſe of ſhipping and mariners, and the increaſe of the king's revenue, which is of a common good to the kingdom; and therefore he may erect a concurrent port though near another, ſo it be not within the proper limits of the former; as ſhall be ſhewn in the caſe of Hull and Yarmouth hereafter mentioned.

But, 1. it cannot be erected within the peculiar limits by charter or preſcription belonging to the former port, becauſe that is part of the intereſt of the lord of the former port. Neither can the firſt port be obſtructed or wholly defaced, or excluded for arrival of ſhips, but by act of parliament, as was done in the caſe of Melcombe tranſlated to Poole. *Rot. Parl.* 11. *H.* 6. *n.* 30. And the reaſon is, becauſe a publick intereſt is concerned; viz. the intereſt of the merchant at large, and the intereſt of the traders and mariners in that particular place or port, who have a right ſettled in them for the application, lading, and unlading of ſhips there.

2. If the king have an ancient port at *A.* and he erect another port hard by, with a generall prohibition that no man ſhall bring his goods or merchandizes by ſea to any other port within five miles but to that which is newly erected, this prohibition is good, as againſt the king's intereſt in the former port, though the new port be erected within the precincts of the old; for he may derogate from his own ſimple intereſt by his own reſtriction. But this reſtriction is not good againſt the ſubjects of the port of *A.* who by uſage had a right to come with their own ſhipping, and lade and unlade: and this although the goods might be cuſtomable goods; for the inhabitants of *A.* had an eaſement acquired to themſelves by preſcription.

3. But if the king erect by his own proclamation a port at *A.* where there was no arrival of ſhips before, and doth not grant it to another perſon, but keeps the intereſt in himſelf of this franchiſe; there it ſeems the king may diſſolve this port, or erect another port, with a prohibition that no ſhip ſhall arrive within

within ſuch a diſtance, but at the new port: for there was no right of arrivage of any ſhips at the former harbour lodged in the inhabitants nor any other ſubject, but only permiſſive at the king's pleaſure, and he may derogate from his own right.

4. But if a ſubject hath a port and arrival of ſhips at *B.* by preſcription or charter, and afterwards the king erect a new port, within three or five miles within or without the precincts of the port of *B.* with a prohibition that no ſhips ſhall arrive within five miles of the new-erected port elſewhere; this prohibition or reſtriction is void, as againſt the intereſt of the owner of the port of *B.* or the inhabitants of *B.* becauſe there was a former intereſt lodged in the owner and inhabitants of the port of *B.* which cannot be taken from them without their own conſent, or by act of parliament.

5. But if a ſubject, or the king's fee-farmer, hath a port at *R.* by preſcription or charter, and the king grants that no ſhips ſhall arrive within five miles or ſuch like compaſs, the king cannot within that precinct erect *de novo* a port to the prejudice of that port to which he had precedently granted this privilege. For the grant is good as againſt the king, and any intereſt derived from him after this grant: and although, as hath been ſaid, without this reſtrictive clauſe, the king might have erected a port near to the former, which would have had this concurrent power or franchiſe, yet the king hath bound up his hands by his own charter; and by this inhibition, the precinct, to which this inhibition extends, is become as it were parcell of the precinct of the port.

Theſe diverſities will appear by the two caſes following, which I ſhall put at large.

The caſe or rather hiſtory of the port of Great and Little Yarmouth, which makes good the moſt of the differences above expreſſed, was this:

The king had anciently the great port of Great Yarmouth, where his cuſtom-houſe was kept, and his cuſtomes anſwered ever ſince there were cuſtoms, extending from Great Yarmouth to the ſea. The king anciently granted this town and the port in point of franchiſe to the burgeſſes of Great Yarmouth at an ancient fee-farm rent. *Cart. antiq. K.* 35. *Cartam inde burgenſibus per regem Johannem anno regni ſui* 9°.

The king was likewiſe ſeized of the manor of Little Yarmouth, lying between Great Yarmouth and the ſea and within the precincts of the port of Great Yarmouth; of which manor of Little Yarmouth the town of Gorleſton was parcell.

At the manor of Little Yarmouth there had been ever anciently a ſmall port for arrival of ſhips, as well of forreigners as of the

the tenants; and this ſeems to be belonging to the manor of Little Yarmouth, and the king had port duties there ariſing to a conſiderable ſum.

King Edw. 1. being thus ſeized of this manor permitted John de Britannia, earl of Richmond, to hold this manor and port of Little Yarmouth at will.

The ſame king, during this poſſeſſion of John de Britannia, viz. granted to the burgeſſes of Great Yarmouth and their ſucceſſors, *quòd omnia mercandiſa et mercimonia quæcunque, ſive ſunt de piſcibus ſive de aliis rebus quibuſcunque, infra dictum portum dictæ villæ, quæ infra dictum portum dictæ villæ Magnæ Jernemuthe, in navibus aut batellis, ſeu alio modo adduci ſeu deferri contigerit, ut ibidem negotietur de eiſdem, licitè et apertè apud eandem villam de Magna Jernemutha et non alibi infra portum prædictum diſcarcentur, et ibidem vendantur, abſque aliquo forſtallamento vel abrochiamento vel aliquo alio impedimento.* This charter was granted without any antecedent writ of *ad quod damnum*, as was uſual in caſes of ſuch extraordinary grants.

The town and little port of Little Yarmouth, being between Great Yarmouth and the ſea and within the precincts of Great Yarmouth; ſhortly after the ſame king granted the manor of Little Yarmouth and Gorleſton unto the ſame John de Britannia, and the heirs of his body, together with all fairs and markets and franchiſes, as fully and freely as John de Bayliffe held the ſame; which manor and alſo the port thereunto belonging the ſaid John de Bayliffe it ſeems formerly held.

After this grant there aroſe great ſuits between the burgeſſes of Great Yarmouth and John de Britannia and his tenants of Little Yarmouth and Gorleſton, touching the privilege of this port; thoſe of Great Yarmouth inſiſting upon it,

1ſt, That the whole port belonged to the farm of Great Yarmouth, and that Little Yarmouth was not indeed a port, but rather an uſurpation and foreſtall upon the port of Great Yarmouth.

2d. That if it were any ſuch thing as a port, yet at the time of the charter granted by the king to thoſe of Great Yarmouth, that merchandizes ſhould be unladen at Great Yarmouth *et non alibi*, the manor and port of Little Yarmouth was in the king, and the anceſtors of John de Britannia were then only tenants at will to the king, and the grant of the inheritance thereof to John de Britannia was ſubſequent to that charter of Great Yarmouth, and the king might well derogate from his own intereſt when the charter was granted; and conſequently the intereſt of John de Bretaigne, being ſubſequent to the charter of Great

Great Yarmouth, was ſubject to and bound by the reſtriction and inhibition. And ſurely as to the intereſt of franchiſe that was claimed by John de Britannia, they ſaid very true.

Upon this ſuits were commenced in the common-pleas againſt many of Little Yarmouth for foreſtalling the port of Great Yarmouth; which ſuits were long ſtaid, becauſe John de Bretaigne was not made party, and becauſe the king's intereſt in reverſion was concerned. And touching this matter croſs petitions were preferred in the parliament of 8. E. 2. and inquiſitions directed to be taken touching both intereſts, as appears *Rot. Parl.* 8. *E.* 2. *m.* 9. And though I do not find upon record what iſſue this had, yet it ſeems by the book of 2. E. 3. 7. *per Claver*, that in the parliament the charter of Great Yarmouth was affirmed *per le councelle le roy*; which is to be intended the *legale concilium regis* either in parliament or in chancery.

But yet John de Bretaigne did not reſt ſatisfied with this determination, but petitioned again in parliament; ſetting forth his whole caſe, and that the men of Great Yarmouth by colour of their charter, gotten without any writt of *ad quod damnum*, had diſturbed him of arrival of ſhips at Little Yarmouth.

This petition is ſent by writ to the king's-bench; and after a kind of declaration upon the petition, the defendants, viz. thoſe of Great Yarmouth, pleaded in effect thus:

1ſt. As to the king, they have his charter, that ſhips ſhould be diſcharged *ibi et non alibi*.

2d. As to John de Bretaigne, that at the time of the grant made to them he was but tenant at will to the king, which is too feeble an eſtate to impeach their grant.

3d. *Quant al gents de county nous diomus, que les ports ſont al roy, et fair et market ſont al roy, qui tiel choſe purra graunt à que voudra.*

And upon this they demurred; and the caſe, for weight and difficulty, was again reſumed into parliament. This appears by the book of 2. E. 3. 7, 8.

It lodged in the parliament for a long time; but afterwards it received a deciſion 23 *Junii*, *anno* 5. *E.* 3. by a bond of judgment or award, by the conſent of the king and ſubmiſſion of parties, made by the biſhop of Winton chancellor, Stoner and Cartwright juſtices, Robert Ufford and Oliver Ingham, *et alios de concilio*; who, upon a full examination of the rights, claimes, and evidences of both parties, gave their judgment, which was confirmed by the king by patents under the great ſeal, and entered *Rot. Pat.* 5. *E.* 3. *pt.* 1. *m.* 1. which was not only an arbitrary determination, but in nature of judgment upon the meritts of the cauſe.

They

They first recite the charter of Great Yarmouth, the suits that had arisen in divers courts between them, the examinations and inquisitions that had been taken touching the right of either party, and then adjudge and determine as followeth:

1. *Portum Fernemuthe unicum portum esse, et ad eandem villam Fernemuthe Magnæ in perpetuum declaraverunt et ordinaverunt.*

2. *Quòd naves omnes, quæcunque fuerint, infra portum seu aquam de Fernemuthe cum bonis rebus seu mercandisis, de quibus custumæ ad opus domini regis hæredum et successorum suorum per collectores suos ad hoc assignatos seu assignandos, sicut in aliis portubus regni in Anglia, levari seu capi debent, veniant apud dictam villam de Magnæ Fernemuthe, et ibidem custumas solvant; et apud eandem villam Magnæ Fernemuthe, et non alibi, infra portum prædictum discarcentur, et per manus bona res et mercandisas prædictas ducentium seu deferentium et ea ibidem vendere volentium, seu per manus servientium suorum, venditioni exponantur, et ibidem quibus voluerint liberè vendantur et emantur absque aliquo forestallamento vel abrochiamento, seu alio quovis impedimento; propriis navibus ipsorum hominum et tenentium dictarum villarum Parvæ Fernemuthe et Gorleston, hæredum et successorum suorum, tantùmmodo exceptis.*

3. *Quòd naves dictarum villarum de Parvæ Fernemuthe et Gorleston, oneratæ cum bonis de quibus custumæ ut præfertur debitæ sunt, ad eandem villam Magnæ Fernemuthe venient, et ibidem custumas suas solvant, quibus custumis ibidem persolutis, præfati homines et tenentes dictarum villarum Parvæ Fernemuthe et Gorleston, hæredes et successores sui, cum prædictis navibus suis, et servientes sui cum navibus illis, ad easdem villas Parvæ Fernemuthe et Gorleston pro voluntate suâ redeant et ibidem discarcent, vel alibi eant quò voluerint, et de bonis rebus et mercandisis in eisdem navibus existentibus commodum suum facient, sine impedimento ipsorum burgensium hæredum et successorum suorum quorumcunque, et absque eo quòd ad dictam villam Magnæ Fernemuthe contra voluntatem discarcare, seu alias custumas ipsorum burgensium Magnæ Fernemuthe hæredum seu successorum suorum solvere compellantur seu teneantur: ita tamen, quod si iidem homines et tenentes prædictarum villarum Parvæ Fernemuthe et Gorleston, hæredes vel successores dictas naves suas proprias ad prædictam villam Magnæ Fernemuthe gratis discarcare voluerint, tunc de navibus illis et bonis et rebus et mercandisis in eisdem existentibus alias custumas debitas et usitatas dictis burgensibus villæ Magnæ Fernemuthe, prout justum fuerit, solvant.*

4. *Quòd omnes aliæ naves bonis rebus et mercandisis quibuscunque, sive de allece sive de aliis piscibus, vel aliis rebus, de quibus hujusmodi custumæ ad opus ipsius regis hæredum et successorum suorum gari non debent, carcatæ infra*

dictum

dictum portum et aquam venientes (propriis navibus ipsorum hominum et tenentium villarum Parvæ Jernemuthe et Gorleston, hæredum et successorum suorum, tantùmmodo exceptis) apud eandem villam Magnæ Jernemuthe, et non alibi discarcentur, et per manus bona res et mercandisas hujusmodi ducentium vel deferentium et ibidem vendere volentium, seu per manus servientium suorum, venditioni exponantur, et ibidem quibus voluerint liberè vendantur et emantur, absque aliquo forstallamento vel quovis alio impedimento.

5. *Quòd præfati homines et tenentes dictarum villarum Parvæ Jernemuthe et Gorleston, hæredes et successores sui, proprias naves suas bonis rebus et mercandisis suis, sive de allece, sive de aliis piscibus, et aliis rebus quibuscunque carcatas, de quibus hujusmodi custumæ dari non debent, ad prædictas villas Parvæ Jernemuthe et Gorleston, vel alibi pro voluntate suâ discarcare, et bona res et mercandisas hujusmodi venditioni exponere, et aliàs commodum suum inde facere volebant, absque impedimento ipsorum burgensium et hæredum suorum quorumcunque: ita tamen quòd iidem homines et tenentes dictarum villarum Parvæ Jernemuthe et Gorleston, hæredes et successores sui, colore premissorum naves aliorum suas proprias esse non advocent quovismodo in præjudicium dictorum burgensium, hæredum vel successorum suorum; quod si facerint, et inde modo legitimo convicti fuerint, bona res et mercandisas in navibus sic advocatis seu advocandis inventa, si de assensu et voluntate dominorum eorundem bonorum rerum et mercandisarum advocata fuerint, domino regi et hæredibus suis forisfacta remaneant; et si sine assensu hujusmodi dominorum tales onerationes fiant, nihilominùs hujusmodi advocantes versus dictum dominum regem et hæredes suos graviter puniantur.*

6. A provision for the liberties of the cinque ports, Norwich, and London, and a security provided for both places to keep the order.

This is the substance of this award and judgment, which was also afterwards enforced with a concurrent order of the king and his councill. *Pat.* 6. *E.* 3. *par.* 2. *m.* 19.

This determination I have thus at large transcribed, because it was most consonant to justice.

1st. The king's right for his customs is preserved; for indeed it is most plain, that Great Yarmouth was always the port where the king's customs were answered.

2. The right of the tenants and inhabitants of Little Yarmouth, which they had for their own shipping by constant usage, is prescribed, that for their customable goods they shall not be charged with the port-duties belonging to Great Yarmouth, and for goods not customable they shall not be enforced to bring them up.

3. The right of franchiſe for the lord of the port of Little Yarmouth is not at all taken care for, as in referrence of ſhips of ſtrangers; but the inhibition ſtands as to them; becauſe the king had the port of Little Yarmouth when he granted the privilege to the port of Great Yarmouth, and he might derogate from his own intereſt.

But yet the burgeſſes of Great Yarmouth reſted not here. They were a great and conſiderable port, and had great influence at court. Therefore in E. 3. a great precinct of the ſea called Kirkley-road, being five miles in the main ſea, was annexed to the port of Great Yarmouth, and a new clauſe added to the charter, that no herring ſhould be unladen or ſold within ſeven miles of the port of Great Yarmouth during their fair, or in Kirkley-road; and it appears, that *Hil.* 49. *E.* 3. *B. R. rot.* 14. divers perſons were impleaded for unlading and ſelling of herring, contrary to the tenor of thoſe charters.

This alarmed the country; and thereupon, *Rot. Parl.* 50. *E.* 3. *n.* 49. the charter as to Kirkley-road is repealed by act of parliament, *come choſe fait countre common profit de realme*, ſaving to them their other privileges granted or confirmed by the king or his progenitors with the clauſe *de licet, &c.* And afterwards in the ſame roll, *n.* 76. ſo much of the new grant as concerned the ſale of herring within ſeven miles of Great Yarmouth at the time of their fair, is likewiſe repealed, ſaving their other liberties.

Rot. Parl. 2. *R.* 2. *p.* 2. *n.* 80. their franchiſes concerning Kirkley-road and the ſale of herrings is again revived by act of parliament, according to the charter of king E. 3. notwithſtanding that repeal, with ſome ſmall qualification as to the ſale of herring.

Rot. Parl. 4. *R.* 2. *n.* 39. Upon a new complaint concerning the revivall of thoſe repealed liberties by act of parliament, a commiſſion is to iſſue to enquire touching the inconveniencies.

But *Rot. Parl.* 10. *R.* 2. *n.* 23. the commons in the behalf of the town of Great Yarmouth deſire, that the king in this parliament would grant and confirm unto the town the franchiſe and liberties granted to them by the king's progenitors, and confirmed by the king, according to the form and effect of them. The anſwer is, *Le roy le voet, nient contriſteant aſcun repeale ent fait devant ces heures; purview touts voys, que touts manners de gents, ci bien aliens, come touts les liges de roy, qui viendront pur vender ou acheter herring illonque pourront franchment et paiſſiblement vendre et acheter herring deins le dit vill et port, et meſme herring ent carrier à lour volunt durant le faire ſans grievance ou diſturbance de aſcun.* *V.* 31. *E.* 3. *ſtat.* 2. *cap.* 2.—35. *E.* 3.

And thus I take it the ſtate of the liberties of the port of Great Yarmouth ſtands at this day upon the foot of a confirmation

mation by act of parliament; whereby many of those liberties, which were not by law grantable by the bare strength of a patent or charter, yet having the strength and confirmation of parliament, stand good and effectual.

But this confirmation did not derogate from that agreement, that was settled by the consent of the king and the parties concerned, of the 5th of E. 3. before mentioned. But I think at this day the port of Little Yarmouth and Gorleston are united unto the port of Great Yarmouth, and so all the business settled by that means, if not sufficiently settled before. *Quære tamen*, how that port of Little Yarmouth stands at this day?

And thus I have done with the narrative of the differences between Great Yarmouth and Little Yarmouth, and how they were settled; and likewise the proceeding which the liberties of that port had; whereby it doth appear, that, although the king might grant a concurrent liberty of a port, yet he could not by charter without an act of parliament grant such restrictions that might be prejudicial to a liberty antecedently settled by charter or prescription in others, nor restrain the liberty of buying and selling out of the precincts of a port without the help of an act of parliament. But how far forth there might have been restriction of some kind of commerce within the precincts of a port, shall be seen in the next chapter.

I come now to the narrative of the port of Kingston upon Hull, the application whereof will clear up and prove some other of these differences, which are expressed in the beginning of this chapter.

The case seems to be thus:

The town of Bevery was anciently part of the endowment of the archbishop of York from the time of king Athelstane, as appears *Rot. Parl.* 3. *H.* 5. *par.* 1. *n.* 48. where the old charter of king Athelstane is recited: "As free make I thee, as heart can wish or eye can see." This town bordering upon the sea had a small port belonging to it; and the archbishops also claimed a great portion of the mouth of Humber and the water of Hull, as belonging to that manor and port, viz. from a certain place anciently called Amet to the streams of Humber, the ancient kings of England granted to the archbishops *prisas suas*. And anciently by those words, they claimed only the first taste and buying of wines in the port of Hull, after the king's prisage was answered. But in process of time they came to claim the prisage itself, till judgment given against them in a *quo warranto*. *M.* 6. *E.* 3. 51. *Vide Clauf.* 7. *E.* 3. *par.* 1. *m.* 17.

But besides this liberty, it seems, he claimed and also exercised some port-jurisdiction and privileges, as will appear in what follows, and kept a bailiff constantly in that water for the collecting and preserving of his rights and jurisdiction.

The abbot of Meux was ſeized of a certain ville bordering upon the ſea called Wyke; which being convenient for a port or haven, king E. 1. took in by exchange and enlarged a watercourſe adjoining to it called Sayer Creek, and made it a convenient port for the arrival of ſhips, and built a town there, which he called Kingſton; and to this day is called Kingſton upon Hull.

Between the port of Kingſton upon Hull and the king's bailiff's there, and the archbiſhop of York and his bailiffs of the port of Beverley and the water of Hull, there grew many differences; and in the time of E. 2. the town of Kingſton procured a mandate from the king, *ne qui mercatores cum bonis et mercandiſis per aquam uſque villam prædictam venientes, bona illa in navibus, antequam ad terram venerint, particulatim vendere non preſument.* Thereupon, *Rot. Parl.* 8. *E.* 2. *m.* 16. the archbiſhop complains in parliament, and deſires, that that mandate ſhould be revoked, as prejudicial to that right which he claimed in the water of Hull as belonging to him. And on the other ſide the town of Hull complained againſt the archbiſhop's bailiff, as uſurping in that water prejudicially to the king's port of Kingſton. All that I find done was a mandate directed to the archbiſhop's bailiff, reciting both petitions, commanding the bailiffs of the archbiſhop, *quòd deſiſtant ſuper contentis in brevi illo juxta tenorem ejuſdem, alioquin quòd ſit coram rege ad certum diem oſtenſari, quare non fecerint, quem diem rex dedit burgenſibus antedictis.* After this, in 6. E. 3. fol. 51. a *quo warranto* is ſued againſt the archbiſhop, *ut ſupra*, for his claim of priſage of wines *in aquâ de Hull*, and judgment given againſt him, *ut ſupra oſtenditur.*

In 5. E. 3. the king by charter granted the borough of Kingſton to the burgeſſes of Kingſton, and their ſucceſſors, at the yearly fee-farm rent of 70l. *unà cum feriis mercatis libertatibus et aliis conſuetudinibus, adeò integrè, ſicut dominus rex et progenitores ſui burgum prædictum hactenus tenuerunt.*

M. 44. *E.* 3. *B. R. rot.* 24. *Ebor.* The archbiſhop brought a ſpecial action of treſpaſs againſt the burgeſſes of Kingſton, *eò quòd ipſi impediverunt ipſum tenere et percipere libertates privilegia tolneta et proficua infra totam aquam ſuam de Hull juxta Kingſton ſuper Hull, à quodam loco vocato Amet uſque ſtremes de Humber, viz. habere deodandâ, cognitionem coram ballivo ſuo in aquâ prædictâ de omnibus tranſgreſſionibus conventionibus et contractibus, inter mercatores et marinarios vel alios in eâdem aquâ emergentibus, et excuſationes et amerciamenta inde, et menſurare omnes mercandiſas menſurabiles in aquâ prædictâ, ſcil. blada carbones et per buſſellum ipſius archiepiſcopi ad hoc antiquitùs deputat. capiend. pro quâlibet nâve naviculo ſeu batello hujuſmodi mercandiſas deferentibus, cùm ſic fuerint menſurati, quatuor denarios; et quòd cùm omnes mercatores, cujuſcunque conditionis exiſtant, per aquam prædictam*

dictam liberè mercandisas suas illìc adducere possunt, et ibidem pacificè morari, quousque ea, cuicunque illa emere voluerint, vendiderunt per voluntatem suam, absque compositione alicùjus mercandisas illas alibi ducentes, sine tolneto muragio aut aliâ consuetudine vel solutione alicui alio quàm præfato archiepiscopo præstandâ, sic ipsi vî et armis absiulerunt quendam batellum, scilicet, per ballivum suum, et deodand. &c. et etiam impediverunt tenere placita conventionis in curiâ suâ, et minati sunt ballivum suum, et officiarios suos impediverunt mensurare blada ostita, &c. per bussellum suum, et levare 4 d. de quâlibet nave, &c. et compulerunt diversos mercatores illis solvere varias pecuniarum summas.

The defendants set forth and shew their grant in fee-farm of the 5. E. 3. and that the place, where the archbishop claimes these liberties and supposeth the trespass, is called Sayer Creek, which is parcell of the ville and within the borough of Kingston; *et non intendunt quòd rege inconsulto.* The archbishop saith it is not parcell, *ec quòd villa prædicta vocabatur le Wyke, et fuit in seisinâ abbatis de Melsu, et quòd dominus Edwardus avus regis fecit excambium cum prædicto abbate de prædictâ villâ de Wyke, simul cum aliis terris, ad quod tempus idem avus misit Petrum de Campana pro extentâ inde faciend. et quòd in eâdem extentâ nihil compertum est de aquâ predictâ esse pertinentia dictæ villæ, nec parcella ejusdem villæ, &c.* and so would counterplead the aide of the king's bailiffs. The court awarded, *quòd non procedatur rege inconsulto.* Afterward a *procedendo* came. Then the mayor and burgesses plead as to the deodand, and they demand judgment, whether he shall make title without a charter; and as to the rest pleads, viz.

Quòd archiepiscopus est dominus villæ de Beverlaco, ad quam quidèm villam pertinebat aliquo tempore quædam applicatio batellorum et aliorum hujusmodi minutorum vasorum, de quibus dominus archiepiscopus cepit custumas tolneta, &c. quia fuit dominus soli ex utrâque parte aquæ, et quòd naves applicabant ad quendam locum vocat. Grevale, et quòd postquam dominus rex Edwardus avus excambiavit cum præfato abbate de Meux pro prædictâ villâ de Wyke, ædificavit in loco illo de [illegible]iis et bercariis quandam villam ibidem et illam nominari fecit [illegible]lon, infra quam villam est quidam cursus aquæ, qui vocatur Sayer Creek, et est bunda inter dictam villam de Drypoole, quem quidèm cursum aquæ idem dominus rex avus admeliora-vit per remotionem et pontium in eodem cursu existentium, et ibidem quendam portum fecit, et ad opus suum capere fecit diversas custumas et alia proficua de diversis bonis et mercandisis in eodem portu provenientibus, et postmodùm per cartam suam fecit prædictam villam in liberum burgum, et homines ejusdem villæ liberos burgenses, et eis concessit diversas libertates, &c. Et dicunt, quòd prædictus cursus aquæ et prædictus portus sunt pertinentes ad burgum prædictum et parcella burgi prædicti, et sunt idem locus ubi prædictus archiepiscopus modò queritur transgressiones prædictas sibi fieri;

fieri; ac eò quòd archiepiſcopus per miniſtros ſuos capi fecit infra portum prædictum diverſa tolneta et cuſtumas à diverſis mercatoribus de mercandiſis eorum ibidem exigerunt, per quod dicti mercatores cum mercandiſis ſe retraxerunt in damnum et præjudicium libertatis burgi, ideò mayor et ballivi dictos miniſtros archiepiſcopi impediverunt et non permiſſerunt ipſos capere proficua prædicta, prout his bene licuit, abſque hoc quòd ipſi impediverunt miniſtros archiepiſcopi in aliquo alio loco quàm in Sayer. Creek, &c.

The archbiſhop maintains, that he and his predeceſſors have been *in ſeiſinâ de prædicto loco de tempore cujus, &c.* And the mayor and burgeſſes reply, *quòd non fuerint in ſeiſinâ de tempore quo, et de hoc ponunt ſe ſuper patriam; et archiepiſcopus ſimiliter.*

Several continuances there are upon the roll, but no verdict given, as I can find. Poſſibly it was not proſecuted; for the port ſtill enjoy their liberty. But upon this record theſe things are obſervable:

1. The original of one of the moſt eminent ports in England, viz. Kingſton upon Hull.

2. That a ſubject may by preſcription and uſage have a conſiderable precinct of a haven of the ſea, as well in point of intereſt as juriſdiction; for otherwiſe an iſſue upon the fact would not have been taken: for as this was a buſineſs of great moment, and conſequently much care taken both by the counſell of the king and alſo by the counſell of the town that no advantage ſhould be loſt; ſo the law and pleading were at this time in the greateſt height that ever it was; and as much may be collected upon the pleading at this time as at any time, eſpecially in a caſe of ſo much moment and importance.

3. That a ſubject by preſcription and uſage might have a port and arrival of veſſels, as here the archbiſhop had at Beverley.

4. That yet the king might erect a port within a ſmall diſtance from the port that was there before, and ſo ſettle a concurrent liberty of a port; for Kingſton is but a ſmall diſtance from Beverley.

5. That though the port of Beverley were but a ſmall port for ſmall veſſels, which might perchance with more eaſe apply themſelves at Kingſton; though this erection of a new port hath a concurrent juriſdiction, as I may call it, with that of Beverley, yet it doth not, neither can it, take away that liberty, which by preſcription was lodged both in the archbiſhop in point of franchiſe, and in the inhabitants of Beverley in point of eaſement and uſe.

6. That although poſſibly there might ſome cuſtomable goods come up to Beverley in ſmall veſſells, yet without the help of an act

act of Parliament that could not be reſtrained by the erection of a new port by the king.

And herein the difference appears between this caſe and that of Yarmouth before. For in the caſe of Yarmouth, the whole port is declared to be belonging to Great Yarmouth, as a port which was ſuch time out of mind. But here the port of Kingſton was puiſne to that of Beverley, and ſo might not derogate from that right, which was anciently ſettled there, by any reſtriction.

But then it may be ſaid, what remedy had the king to ſecure his cuſtoms, if he could not conſtrain the merchant to come to his port?

I anſwer,

1. Though he could not conſtrain the merchant from going to the port of Beverley, yet he might and did reſtrain him from ſelling by parcells upon the water within the port of Hull; for that, as ſhall be ſhewn, is againſt the privilege of a port, to be foreſtalled in ſuch manner upon the water.

2. Though the port of Beverley belonged to a ſubject in point of franchiſe and propriety, yet the king hath his *jus regium* in that port, in order to the ſecuring of his cuſtoms, and might place a ſearcher there, or other officer, for the ſecuring of his cuſtoms.

3. There was yet a harder tye upon the merchant; for if he landed or laded his goods, the cuſtom not paid, there was a forfeiture. Therefore it concerned him to reſort to that port where the king's officers of his cuſtoms were ſettled, there to pay or compound his cuſtoms, and obtain the warrant of the cocquet, which was only kept where the king had a collector and comptroller of his cuſtoms ſettled; and when he had that cocquet he was at liberty to land where he pleaſed, either at Kingſton or Beverley; and by this means the king's duty was ſecured, and the right and liberty of the merchant and archbiſhop provided for and ſalved.

But as to the landing of goods inward the ſtatute of 1. El. cap. 11. and as to lading of goods outward the ſtatute of the ſtaple while in force, did alter the liberties of ports exceedingly; whereof hereafter.

And thus much ſhall ſerve touching the creation and erection of ports. I ſhall now deſcend to the conſideration of thoſe *jura portûs*, or *portatica*,

CAP.

CAP. VI.

Touching the threefold right in ports, viz. jus privatum, jus publicum, *and* jus regium.

AND firſt of the *jus privatum.*

Having now conſidered the originall of ſea-ports, I come to the ſeveral rights, that are to be found, and obſerved, and carefully diſtinguiſhed in the conſideration of publick ſea-ports.

In all publick ſea-ports in England, there are three kinds of rights that meet; and though they are diſtinct one from another, yet they conſiſt one with another, whether the ports belong in point of franchiſe or propriety to the king or to a ſubject.

I. *Jus privatum*, intereſt of propriety or franchiſe.

II. *Jus publicum*, the common intereſt that all perſons have to reſort to or from publick ports, as publick ſea-marts or markets, with their goods, and wares, and merchandizes.

III. *Jus regium*, or the right of ſuperintendency and prerogative, that the king hath for the ſafety of the realm, or benefit of commerce, or ſecurity of his cuſtoms.

Of theſe ſeverally and largely; and in this chapter I ſhall make an introduction at leaſt into the *jus privatum* that is to be found in publick ports. And this *jus privatum* takes in theſe ſeverall branches:

(1.) The right of the lord or owner of the port.

(2.) The right of thoſe that have the propriety of the ſhore contiguous to the port.

(3.) The right of the town, or *ville*, that is the *caput portûs*, and the inhabitants thereof.

(1.) As touching the firſt of theſe, the right of the lord of the port, we have before ſhewn, that, though of common right the king is *primâ facie* the owner and lord of every publick ſea-port, yet a ſubject may by charter or preſcription be lord or owner of it; and therefore I ſhall not again repeat that matter.

This ownerſhip, that the king *primâ facie* hath, and a ſubject may have, is of two kinds; and ſometimes, and moſt commonly, they concur in the ſame perſon; but they may be divided, viz. the intereſt or ownerſhip of propriety, and the ownerſhip of franchiſe.

1. The

1. The ownerſhip of propriety is, where the king or common perſon by charter or preſcription is the owner of the ſoil of a creek or haven where ſhips may ſafely arrive and come to the ſhore. This intereſt of propriety may, as hath been ſhewn, belong to a ſubject. But he hath not thereby the franchiſe of a port; neither can he ſo uſe or employ it, unleſs he hath had that liberty time out of mind or by the king's charter. Indeed he may bring thither for his own private uſe his own boats and veſſels to carry off and bring in his own goods that are not cuſtomable, as fiſh, &c. but he may not uſe it as a publick port or admit forreigners unleſs in caſe of neceſſity, nor take toll or anchorage there; for that is fineable, either by preſentment, or in a *quo warranto*, as hath been ſhewn.

2. The ownerſhip of franchiſe. This is that, which gives the formality or denomination of a publick or lawful port, and becomes a free arrival of ſhips to lade and unlade their goods and merchandiſes; and this may be acquired by preſcription, or by creation by the king either by proclamation or by charter.

Before any port is legally ſettled, although the propriety of the ſoil of a creek or harbour may belong to a ſubject or private perſon, yet the king hath his *jus regium* in that creek or harbour; and there is alſo a common liberty for any to come thither with boats and veſſells as againſt all but the king.

And upon this account, though *A.* may have the propriety of a creek or harbour or navigable river, yet the king may grant there the liberty of a port to *B.* and ſo the intereſt of propriety and the intereſt of franchiſe ſeveral and divided. And in this no injury is at all done to *A.* for he hath what he had before, viz. the intereſt of the ſoil, and conſequently the improvement of the ſhore and the liberty of fiſhing; and as the creek was free for any to paſs in it againſt all but the king, for it was *publici juris* as to that matter before, ſo now the king takes off that reſtraint, and by his licence and charter makes it free for all to come and unlade.

But if *A.* bring the *ripa* or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa* without his conſent, unleſs cuſtom had made the liberty thereof free to all, as in many places it is; for that would be a prejudice to the private intereſt of *A.* which may not be taken from him without ſuch conſent.

And therefore, in the creation of a new port either by proclamation or charter, it hath been the courſe to ſecure the intereſt of the ſhore beforehand for the building of wharfs and keys for the application of the merchandize, and for the building

building of houſes of receipt, as we ſee was done in the caſe of Hull.

So that it is poſſible, though not ordinary, that the intereſt of propriety and the intereſt of franchiſe may be divided; but it is uſuall and beſt in conjunction.

Now from this *jus dominii* of property or franchiſe, or both, there ariſe ſeveral port-duties, ſometimes called *portatica*, ſometime tolls, ſometime cuſtoms; and theſe are of two kinds, viz.

Such as are common or ordinary, and ſo almoſt incident to every ownerſhip of a port:

Or ſuch as are by ſpecial uſage or preſcription.

Touching thoſe of the former ſort ſuch are,

Anchorage, or a preſtation or toll for every anchor caſt there; and ſometimes though there be no anchor. And this doth in truth properly and *primâ facie* ariſe from or in reſpect of the propriety of the ſoil, and is an evidence of it. But yet it is not ſo always, but grows due in reſpect of the franchiſe; for many times where the ſhore of a harbour belongs to a private lord or owner, yet if at full ſea a ſhip lets fall an anchor upon that place, the king or lord of the port in point of franchiſe hath uſually the anchorage; as I know it hath been uſed in the harbour of Plymouth, where yet ſome lords adjacent have the ſoil of the ſhore in ſome places to the low-water mark.

Ballaſtage of ſhips, or a toll for liberty to take up ballaſt out of the bottom of the port. This ariſeth from the propriety of the ſoil. The liberty in the Thames is granted by the king to Trinity-houſe without any toll for the ſame. And of this ſort are alſo the ballaſt ſhores for the unlading of ballaſt, commonly built within the high-water mark, eſpecially at Newcaſtle.

Touching the ſecond, the port duties, that may be due to the Lord or owner of a port by cuſtom or preſcription, are various, and many times differ in ſeveral ports; as namely,

Buſſelage, ſuch as appears to be claimed in the water of Hull. And ſuch were uſually anſwered to the kings and dukes of Cornwall in the port of Plymouth.

Keelage, viz. for every veſſell coming within the port a certain toll. Such was that cuſtom due to the king, viz. *de quolibet batello cum remigio quatuor denarios, et de minore navigio unum denarium*; as appears in the record of the caſe between the town of Newcaſtle and the prior of Tinmouth, 20 E. 1. hereafter more at large ſet forth.

Certain other tolls, called, *average*, *primage*, and *petty-loadning*, mentioned in divers records. And of this kind are thoſe duties that are taken in the port of Exeter, under the king's

king's grant of the fee-farm of that port and city, called petty cuſtoms, viz. certain ſmall rates upon merchandizes imported, which have been uſually paid there. See the decree aſſerting the ſame, *M.* 15. *C.* 1. *in Scaccario* hereafter mentioned.

Leſtage, that were port duties of goods unladen. *M.* 21. *E.* 1. *C. B. rot.* 89. Leſtage in Lynn, of goods imported belonging to Thomas Hanvil.

Priſage, not that ancient priſage due by prerogative to the crown, whereof hereafter, but certain cuſtomary priſes of fiſh, wines, wood, ruſhes, &c.—Thus in the port of Newcaſtle it appears by the record before mentioned, the king uſed to have of every ſhip laden with herrings, 100 herrings freely; of a ſhip laden with haddocks, 100 haddocks for ſix-pence; of every ſhip laden with ſome other kind of fiſh, the beſt fiſh for a penny.—And theſe priſes were often taken by the conſtables of the king's caſtles in thoſe ports, in right of the king, or by ſome title derived under him by grant or preſcription. *Vide H.* 13. *E.* 1. *B. R. rot.* 2. *Briſtoll*, an inquiſition ſetting forth, *quot friſcos piſces quilibet batellus applicans apud Briſtoll cum friſcis piſcibus debet reddere conſtabulario caſtri Briſtoll. Vide Communia Mich.* 3. *E.* 3. *in Scaccario.*—The conſtable of the Tower of London uſed to take to the uſe of the king of every fiſher-boat of London fiſhing for ſpratts in Thames, ſix ſhillings and eight-pence, of every foreign fiſhing-boat eight ſhillings; and he uſed to take for his own fee, of every veſſel laden with ſmelts coming by the poſtern gate of the Tower 100 ſmelts for a penny; and ſo for ſhips laden with oyſters, herring, firewood, ruſhes, &c. a certain proportion ſet forth in the record. *Vide ſtat. Magna Cart. cap.* 19. 36. *E.* 3. *cap.* 2. *&c.*

And theſe kinds of duties were ſometimes called tolls, ſometimes *conſuetudines*; touching which, when they were in the king's hand, not lodged in a ſubject by grant or preſcription, the king by his charter might, and often did grant diſcharges, as well as of other inland tolls. But when they were before lodged in a ſubject by grant or preſcription, the king could not diſcharge them by his charter; and by this we may the better underſtand thoſe ancient charters. *Vide Cart. Antiq. E. E. n.* 8. the grant of R. 1. to the abbots of Peterborough to be quit of all toll *in foris et nundinis et omni tranſitu pontium maris et portuum maris*: the like, *ibidem, L.* 11. 26. by Hen. 2. to the abbot *de loco Sancti Edmundi*, to be quit of toll *in omnibus foris et nundinis, et in omni tranſitu pontium viarum et maris per totum regnum*; and in ſome caſes to be quit *de omnibus conſuetudinibus*, in tide and of tide, by ſtrand and by ſtream, &c. which are not intended of cuſtoms properly ſo called, which is the buſineſs of the third part of this book.

But

But of thoſe cuſtomary tolls, *vide* ſir John Davis's Reports, fo. 8. concerning the latitude of the word *couſtuma* and *conſuetudo* in the king's grant.

And thus much ſhall ſerve touching the intereſt of propriety and franchiſe in the very port, viz. that part of the ſea wherein ſhips come to unlade their goods.

(2d.) There is a ſecond intereſt conſiderable, viz. the intereſt of the ſhore adjacent to the port. Though it is true it is rare to find any port, but that the king or the owner of the port in point of franchiſe hath ſuch a convenient portion of the ſhore and land adjacent, where wharfs and keys and ware-houſes may be built, for the lading and unlading and ſafe-guard of merchandizes; yet the intereſts are and may be divided, however they are ſeveral in their nature; and the duties that ariſe by reaſon of the goods when unladen and laid on ſhore, or in relation thereunto, are different from thoſe that have been before ſpoken of. And many times it falls out, that ſuch a place within a port may be of great conveniency to make a common key or wharf where the propriety of the ſoil may belong to a ſubject, whereby either his intereſt muſt be bought in by the lord of the port, or he muſt have thoſe benefits that may ariſe by the taking or landing of merchandize.

Now touching the rights that happen by reaſon of this intereſt in the ſhore, they are very many and various, according to the various concernes unto which they relate.

Theſe ſhore-duties, as I may call them, will be conſiderable,

In the natures and names of the things themſelves:

In the title or means whereby they grow due.

Touching the former of theſe, the names and natures of the duties themſelves, they are various.

1. *Towage*, or ſomething due for the liberty of veſſels up to the port.

2. *Moreage*, a ſum due by uſage for moreing or faſtening of ſhips to trees or poſts at the ſhore.

3. *Terrage*, for the neceſſary unlading of goods before they come up to the common key.

And of theſe I ſhall deliver at large, when I come to the conſideration of *jus publicum*.

4. *Cranage*, or duty for the taking up or lading on a ſhip any goods or merchandize by that engine.

5. *Wharfage* or *keyage*, a toll or duty for the pitching or lodging of goods upon a wharf.

6. *Houſellage*, or a toll for the uſe or liberty of ware-houſe room.

7. *Tolls*, or duties for weighing merchandize; which is,

Either

Either *Tronage*, which was the king's duty for the weighing of wooll at the king's beam in all ports wherein woolls were exported; whereof at large when we come to the cuſtoms:

Or *Peſage*, which was for the weighing of other merchandiſe of averdupoiſe. Of this alſo when we come to the cuſtoms.

8. *Meaſurage*, which was a toll due for the uſe of a common buſhell or other inſtrument to meaſure dry or wet goods imported or exported.

Many more of this nature we may find, ſome whereof are mentioned *Rot. Parl.* 50. *E.* 3. *n.* 163. where a petition is againſt inhancing of them.

Thus much ſhall ſerve concerning the duties themſelves, their names and natures.

Now concerning the title whereby they may accrue, which is of three kinds:

Firſt, Convention or agreement:
Secondly, Preſcription or cuſtom:
Thirdly, Charter or grant.

Firſt, touching conventional duties, and how and where they may be taken, I ſhall deliver in theſe enſuing poſitions.

1. As we have before obſerved, no man can erect a new publick port without the king's licence; neither can he take out of a port any certain conſtant rates for the lading of merchandizes, but he may make particular agreements with every one that comes there by his conſent to land his goods. This was reſolved, *P.* 11. *Car. B. R.* in Morgan's caſe, for taking two-pence for every barrel of beer landed at Crockham-pill, for which conſtant taking he was fined 100 marks.

2. A man for his own private advantage may in a port town ſet up a wharf or crane, and may take what rates he and his cuſtomers can agree for cranage, wharfage, houſellage, peſage; for he doth no more than is lawful for any man to do, viz. makes the moſt of his own. And ſuch are coal-wharfs, and wood-wharfs, and timber-wharfs, in the port of London and ſome other ports. But ſuch wharfs cannot receive cuſtomable goods againſt the proviſion of the ſtatute of 1. Eliz. cap. 11.

3. If the king or ſubject have a publick wharf, unto which all perſons that come to that port muſt come and unlade or lade their goods as for the purpoſe, becauſe they are the wharfs only licenſed by the queen, according to the ſtatute of 1. El. cap. 11. or becauſe there is no other wharf in that port, as it may fall out where a port is newly erected; in that caſe there cannot be taken arbitrary and exceſſive duties for cranage, wharfage, peſage, &c. neither can they be inhanced to an immoderate rate, but the duties muſt be reaſonable and moderate, though ſettled by the king's licence or charter. For now the

wharf

wharf and crane and other conveniences are affected with a publick intereſt, and they ceaſe to be *juris privati* only; as if a man ſet out a ſtreet in new building on his own land, it is now no longer bare private intereſt, but it is affected with a publick intereſt.

4. But in that caſe the king may limit by his charter, and licenſe him to take reaſonable tolls, though it be a new port or wharf, and made publick; becauſe he is to be at the charge to maintain and repair it, and find thoſe conveniencies that are fit for it, as cranes and weights.

Secondly, the duties that ariſe upon *ripa* or wharf by preſcription.—Thus in many and almoſt all ancient ports are the duties and tolls above-mentioned, viz. cranage, wharfage, houſellage, &c. which are ſettled by long uſage and preſcription; and the ſums, which are to be paid for the ſame, are limited; and ſometimes thoſe remain in the king or lord of the port, ſometimes and moſt commonly granted to the towns that are the *capita portuum*, and they become parcell of their farm, as it is at this day in Newcaſtle, Kingſton upon Hull, and other places. *Vid. ſtat.* 33. *H.* 8. *cap.* 33. *pro conſuetudinibus in Hull.*

All that I ſhall need to add concerning this is, that the duties ſettled in ancient ports by preſcription ought not to be inhanced, nor enlarged beyond their uſual rate or number; for it is part of that *jus publicum* that is veſted in the commonalty, to have their acceſs thither as freely as formerly was uſed. *Vide Rot. Parl.* 50. *E.* 3. *n.* 163. Upon complaint of the inhancing of ancient tolls, and the accroaching of new in the port of London by the king's officers, the anſwer is, *Il pleiſt au roy que les auncient cuſtumes y ſoient tenus, et nul novel impoſition y ſoit miſe.* And ſuch an accroachment is puniſhable upon indictment by fine and impriſonment; for it was one of the articles in Eyre, as hath been formerly ſaid, *de novis conſuetudinibus levatis in regno, ſive in terrâ ſive in aquâ, et quis eos levaverit et ubi.*

Thirdly, the third ſort of port-duties are by patent, which is accidentall, occaſional and temporary; as where there is a neceſſity to build a new key, or to repair the old, it hath been uſuall for the kings of England to grant temporary and reaſonable tolls of all ſhips and merchandizes coming into the port, expreſſing the particular ſums that are to be taken in the patent: and the like hath been done for the building of a new wall about the port town, or the repairing of the old, called *murage*; for in thoſe, and in caſes of the like nature, the ſubject hath *quid pro quo*; and it is to ceaſe, when the buſineſs is done; and infinite inſtances of this nature might be given in all ages.

(3.) I come to the *jus privatum* of the *caput portûs*, or town which is the port-town. And here I ſhall not take in thoſe liberties which a port-town may acquire, either by the king's charter

charter, or by preſcription, or by act of parliament, for theſe may be various as well in port-towns as inland towns; but thoſe liberties or rights that ſeem incident to a port-town *quâ tale*. And ſome indeed are common to every port-town, which is this; that every port-town, if they be able, ſhould furniſh the proviſions for the ſhips and mariners that come to that port; and that there ſhould be no foreſtalling of the port, either by interloping with proviſions, or by new buildings between them and the ſea, which may withdraw the reſort of mariners from the port-town, and poſſibly alſo deceive the king of his cuſtomes: and I ſhall proceed with inſtances herein.

Pat. 14. *E.* 1. *m.* 22. *Pro hominibus mercatoribus de Ravenſroad.*

Rex omnibus ad quos, ſalutem. Quia accepimus per inquiſitionem, quam per dilectum et fidelem noſtrum Thomam de N. eſcaetorem noſtrum ultra Trentam fieri fecimus, quòd homines mercatores noſtri de Ravenſroad benè et ſufficienter poſſunt invenire onni tempore anni, omnibus et ſingulis ad villam illam confluentibus, bonum panem et bonam cerviſiam ſecundùm aſſiſam noſtram inde proviſam, et hoc parati ſunt facere, et nulli de eſſe; et quòd extranei, in prædictâ villâ de Ravenſroad non reſidentes, cupiditate ducti, panem et cerviſiam in navibus ad vendendum ibidem adducunt in ipſorum hominum et mercatorum noſtrorum diſpendium, et ſtatus ſui et villæ prædictæ deteriorationem maximam, et contra conſuetudinem hujuſmodi villarum ſuper mare ſcituatarum: nos, indemnitati hominum et mercatorum noſtrorum provideri volentes in hâc parte, conceſſimus eis, quòd nullus extraneus panem vel cerviſiam in portu vel in mari juxta prædictam villam de Ravenſroad contra voluntatem hominum mercatorum noſtrorum prædictorum vendere preſumat; et ideò vobis mandamus, quòd aliter contra voluntatem hominum et mercatorum prædictorum, quantùm in vobis, eſt, fieri non permittatis. T. R.

But this perchance may be too hard; and indeed it is not ſafe to conclude every thing to be lawful, which may be found in writs and commiſſions of like nature in former or after times.

I come therefore to judicial records; and begin with that notable caſe which I have had occaſion formerly to mention, viz. the ſuit between the town of Newcaſtle, in the behalf of the king and themſelves againſt the prior of Tinmouth, which began in parliament the 20. E. 1. and was finally adjudged *H.* 20. *E.* 1. *B. R.*

It appears by the *Chartæ Antiquæ G.* 22. that king John in the 14th year of his reign, granted to his men of Newcaſtle, at the fee-farm rent of 100*l.* *ſalvis vobis redditibus et priſis et aſſiſis noſtris in portu ejuſdem villæ.*

The prior of Tinmouth his land lay between the town of Newcaſtle and the ſea.

The burgeſſes of Newcaſtle, in the behalf of the king and themſelves, complain in the parliament 19. E. 3. wherein they ſet forth,

1. *Quòd*

1. *Quòd rex habet et habere debet totum portum in aquâ de Tine, à mari uſque ad locum qui dicitur Hidewin ſtreames ita liberè, quod non licet alicui carcare vel diſcarcare mercandiſas aliquas, nec foreſtallum facere de hujuſmodi mercandiſis, emendo vèl vendendo eadem niſi infra villam Novi Caſtri, ita quòd rex tolneta priſas et cuſtumas et alia ibidem ſpectantia percipere poſſit.*

2. That the prior having his lands between Newcaſtle and the ſea, ſhips did lade and unlade at the prior's lands, where there was no port before, and ſo foreſtalled the king's ports.

3. That the king had common ovens or bake-houſes at Newcaſtle, where all vendible bread was to be baked, and not elſewhere.

4. That yet the prior had erected a new town at Sheles, between Newcaſtle and the ſea, and there had common brewers and bakers, whereby the king loſt his furnage.

5. That the king had divers ancient priſages of fiſh and wine at Newcaſtle.

6. That the prior cauſing lading and unlading of ſhips at Sheles, the king loſeth his priſage.

7. That the prior had erected common ovens at Sheles, whereby thoſe that were uſed to come to Newcaſtle to buy their proviſions *in emendationem ejuſdem villæ*, came not, but ſupplied themſelves at Sheles.

8. That the prior kept a market at Sheles, and ſhambles, whereby the country and mariners reſort thither for proviſions, and buy and ſell.

9. That there were certain monks at Tinmouth, that were traders in leather, and laded ſhips at Sheles for exportation thereof.

10. That whereas the king *debet habere towagium batellorum majorum et minorum in aquâ de Tine, aſcendendo à mari ad Novum Caſtrum, et deſcendendo ad mare, liberè per terras dominorum quorumcunque; prædictus prior non permittit hujuſmodi tranſitum facere volentes terras ſuas ingredi; et cùm fortè ingreſſi fuerint, compellit eos reverti et in aquam profundam gradari, unde vix cum vitâ ſuâ evadunt*; whereby merchants and others withdraw themſelves from the town, and do not bring up coal and wood and other things, to the prejudice of the town and damage of the king, who is uſed to have of every great veſſel with oars four-pence, of every leſſer a penny.

To this complaint there are divers pleas and replications; but the ſhort is,

The prior as to any market or port diſclaimed, and thereupon judgment given, *inhibitum eſt ei, nè mercatum vel portum in locis prædictis de cætero teneat, imò quòd omnimoda ſigna quæcunque fuerint tam portûs quam mercati in locis prædictis proſternere faciat et diruere.*

As to divers other matters in queſtion, he makes title and excuſes; whereunto replication was made by the king's attorney,

attorney, and inquiſitions directed to be taken, and were taken and returned and ſent into the king's bench. Thus far the record of the parliament-book of E. 1. goes. But *Hil.* 20. *E.* 1. *B. Regis, Rot.* 59. *Northumb.* upon the inquiſitions thus tranſmitted judgment is given, viz.

Quòd dominus rex habebit totum portum à mari uſque ad quendam locum vocat. Hidenam ſtreames, et quòd nullus in portu illo poſſit carcare vel diſcarcare ſine licentiâ domini regis vel ballivorum ſuorum, et quòd portus ille remaneat domino regi et hæredibus ſuis liberè cum priſis et towagio et omnibus libertatibus ad portum ſpectantibus: ità quòd neque apud Sheles neque apud Tynmuth naves carcentur et wreccum maris, &c.

Yet it ſeems for all this the prior did continue his uſurpations; and thereupon in the parliament of 33. E. 1. the burgeſſes of Newcaſtle make a new complaint, viz. That the prior had gotten a fair for fifteen days at Tinmouth, to the prejudice of Newcaſtle; that goods were laden and unladen at Tinmouth; that bread wine and beer was there ſold, to the prejudice of the town and damage of the king, notwithſtanding the former judgment. And thereupon both parties are adjourned into the king's bench for a farther remedy.

This great record, and the ſolemnity of the proceeding therein, is of great weight and authority to evince, that it is againſt the liberty of a port to have any victualling-houſes erected between a port-town and the ſea without the port-town, and within the precincts of the port; for it is a foreſtalling of the port-town, a loſs to them in their trade, a damage and prejudice to the king in his cuſtoms.

And conſonant to this was that ſolemn decree, that paſſed in the exchequer-chamber, which is entered in the book of orders, *T.* 11. *Car.* 1. *fol.* 303. between the city of Briſtol plaintiff, and Richard Morgan and others defendants. Upon the whole matter, the caſe by the decree is thus ſtated, viz.—That the city of Briſtol is an ancient corporation, and pays a fee-farm rent to the crown.—That the trade of merchandize and repair of ſhipping to Briſtol is of general uſe, advanceth the king's cuſtoms, and the ſhips men and mariners thereby maintained is a great ſafety to the kingdom.—That purpreſtures erections and encroachments upon navigable rivers, to the damage annoyance or foreſtalling of any of his majeſty's ports, have always by judgment upon complaint been abated and removed; and inſtances given. H. 3. in the caſe of Briſtol, 14. E. 1. in the caſe of Ravenſroad, 20. E. 1. the caſe of the men of Newcaſtle and the prior of Tinmouth, in 2. Car. 1. between the town of Newcaſtle, P. 5. Car. 1. in the exchequer-chamber between the town of Newcaſtle and Johnſon

for erections upon the river of Tyne to the prejudice of towage. —That it appeared by the defendants anſwer, that the houſes were erected at Crockham-pill for ſeamen to dwell in —That thoſe erections were between the ſea and the town of Briſtol, where all entries were made, and the king's cuſtoms received.—That it is probable thereby the king's cuſtoms are ſtolen, and merchants goods embezzled; and it is confeſſed, that the inhabitants of thoſe houſes ſell ale beer and other victuals in great abundance; which the court declares to be a manifeſt damage to the port and town of Briſtol, and is againſt the cuſtom of maritime and coaſt towns, as by the record of Ravenſroad appears.—That it appears by proof, that divers of the houſes are built too near the river of Avon; that the water flows up to the walls of the ſaid houſes; that men and mariners, in haleing their ſhips into and out of the pill, are conſtrained to go between the houſes and incloſures and the river in mudd and mire at high-ſpring tide, which is not ſufferable; that the port and river is much ſtraitened and annoyed thereby; that men and mariners are drawn to idleneſs and intemperance by theſe, and ſo to neglect their labours, whereby a ſhip may be loſt, and the port thereby choaked.—That it alſo appeared in proof, that the plaintiffs had uſed to fix poſts at Crockham-pill for moreing of ſhips; and when thoſe decayed, they have fixed more at the pill, and elſewhere upon the river, at their wills, without contradiction, untill the defendant Morgan oppoſed it lately.

It is therefore adjudged and decreed,

1. That but one houſe for the ferry or paſſage-boat ſhall be permitted to ſtand at Crockham-pill, as hath been formerly uſed, and no more.

2. That all other houſes, cottages, and incloſures, made or procured by the defendants, or the father of Morgan, be abated and demoliſhed at the charges of the defendants.

3. That no new buildings or incloſures be made there; but the place ſhall be kept open and free for common and publick uſes, as hath been heretofore accuſtomed.

4. That the plaintiffs and all others reſorting to the port of Briſtol ſhall have free liberty for moreing and haleing of their ſhips, as they have formerly uſed, and may pitch poſts at any of the ſaid harbours, pills, places, and grounds, at their will and pleaſure, for the moreing of ſhips and barques, as formerly they have uſually done.

I have recited this caſe at large; becauſe it is uſeful to that which I have now in hand, and will be neceſſary to be reminded in what follows.

Upon

Upon these two records these things are to be noted and collected, viz.

1. *De facto* Crockham-pill, and that part of Tyne to which Sheles was contiguous, was within the respective ports of Bristol and Newcastle, and between the port-town and the sea.

2. That an erection of houses, or places of receipt for mariners, contiguous or near to the water of that port, between the port and the sea, is an injury to the port-town, a foreſtalling of it, and a prejudice to the customs.

3. That it may therefore be demolished by decree or judgment.

But if it had not had these circumstances, it had been otherwise, viz.

1. If it had been built contiguous to the port-town, it should not have been demolished; and upon that account the buildings below the town do continue, and are not within the reasons of these judgments.

2. If it had been built above the port, it should not have been subject to such a judgment; for it is in that case no foreſtall between the port and the sea, and so no nusance to the port-town as a port-town.

3. If the building had been out of the extent of the port, as if it had been built three or four miles below the pill, it had not been within the reason of either of these judgments, nor might it have been demolished, for it could not be a nusance to the port.

This decree, it is true, was pronounced; but the buildings continue, possibly upon some composition between the parties, or by the proviso for cottages near the sea, in the stat. 27. Eliz. And thus much for the *jus privatum*,

1ſt. Of the lords of ports,
2dly. Of the shore contiguous to the port,
3dly. Of the town or *caput portûs*.

CAP. VII.

Concerning the jus publicum *of ports and harbours.*

BRACTON, *lib.* I. *cap.* 12. *f.* 6. tells us, *quòd publica sunt omnia flumina et portus, ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere cuivis liberum est, sicut per ipsum fluvium navigare. Sed proprietas earum illorum*

illorum eſt quorum prædiis adherent, et eâdem de cauſâ arbores in eiſdem natæ eorundem ſunt. Sed hoc intelligendum eſt de fluminibus perennibus; quia temporaliâ poſſunt eſſe privata. As concerning the publick right of common rivers, whether freſh or ſalt, enough has been ſaid in the Firſt Part. As touching ports, and the publick right of them, Bracton ſaith true; with this allay, that hath been before obſerved, that the law of England doth thus far abridge that common liberty of ports, that no port can be erected without the licence or charter of the king, or that which preſumes and ſupplies it, viz. cuſtom and preſcription.

But when a port is fixed or ſettled by ſuch means, though the ſoil and franchiſe or dominion thereof *primâ facie* be in the king, or by derivation from him in a ſubject; yet that *jus privatum* is cloathed and ſuperinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are intereſted, by reaſon of common commerce trade and intercourſe. And this publick right conſiſts, among other things, principally in theſe:

1. They ought to be free and open for ſubjects and foreigners, to come and go with their merchandize.—But touching this, and how far, and by what means, and upon what occaſion there may be interdictions in this kind, ſhall be at large conſidered in the following chapters.

2. There ought to be no new tolls or charges impoſed upon them without ſufficient warrant, nor the old inhanced; whereof before in the precedent chapter.

3. They ought to be preſerved from impediments and nuſances that may hinder or annoy the acceſs or abode or receſs of ſhips, and veſſels, and ſeamen, or the unlading or relading of goods. And touching this principally in this chapter.

Nuſances of ports are of two kinds.

I. Such as are immediately only nuſances to the private concernment of the lord of the franchiſe of the town that is *caput portûs*, though poſſibly in conſequence may damnify the publick. And ſuch is that of building houſes of receipt between the port-town and the ſea; whereof in the former chapter. And becauſe this doth immediately only concern a private intereſt, it may be diſpenſed with and continued by conſent of the king and parties intereſted, as many of thoſe interloping buildings between the port-town and the ſea are continued; and namely, that of Crockham-pill, which is continued to this day, upon ſome terms poſſibly between the city and the owners of the houſes.—Theſe are not ſo much common nuſances as purpreſtures, which were warrantable by the king; at leaſt with the conſent of the port-town, which was immediately intereſted in the conſequence of them.

II. Such

II. Such nuſances as are common to all men that have occaſion to come, go, or ſtay at ports. I will give inſtances of ſome.

(1.) Silting or choaking up the port, either by the ſinking of veſſels in the port, or throwing out of filth or traſh into the port, whereby it is choaked.

(2.) Decays of the wharfs keys and piers, which are for the landing of merchandize and ſafe-guard of ſhipping.

(3.) The leaving of anchors in the port without buoys or marks, whereby ſhips or veſſels may ſtrike againſt them and be ſpoiled.

(4.) The building of new wears or inhancing of old, whereby navigation or paſſage of veſſels is obſtructed.

(5.) The ſtraitening of the port, by building too far into the water, where ſhips or veſſels might have formerly ridden; for it is to be obſerved, that nuſance or not nuſance in ſuch caſe is a queſtion of fact. It is not therefore every building below the high-water mark, nor every building below the low-water mark, is *ipſo facto* in law a nuſance. For that would deſtroy all the keys that are in all the ports in England. For they are all built below the high-water mark; for otherwiſe veſſels could not come at them to unlade; and ſome are built below the low-water mark. And it would be impoſſible for the king to licenſe the building of a new wharf or key, whereof there are a thouſand inſtances, if *ipſo facto* it were a common nuſance, becauſe it ſtraitens the port, for the king cannot licenſe a common nuſance. Nay, in many caſes it is an advantage to a port to keep in the ſea-water from diffuſing at large; and the water may flow in ſhallows, where it is impoſſible for veſſels to ride. Indeed, where the ſoil is the king's, the building below the high-water mark is a purpreſture, an incroachment and intruſion upon the king's ſoil, which he may either demoliſh or ſeize, or arent at his pleaſure; but it is not *ipſo facto* a common nuſance, unleſs indeed it be a damage to the port and navigation. In the caſe therefore of building within the extent of a port in or near the water, whether it be a nuſance or not is *quæſtio facti*, and to be determined by a jury upon evidence, and not *quæſtio juris*.

(6.) The impediment or hindrance of moreing of ſhips in the ground adjacent, if it hath been ſo anciently uſed, without paying any thing for it. Or if it be a new port, yet it ſeems, the moreing of ſhips being for the general good of commerce, it muſt be ſuffered upon reaſonable amends. See more of this in the next.

(7.) Towage or haleing of ſhips or veſſels up or down a river or creek, to or from the port-town; and of this ſomewhat largely.

I. It

1. It is clear by the judgment in the case of Tinmouth, and the decree in the case of Bristol, above cited in the former chapter, that where this hath been customably used without paying any thing for it, such a custom is good, and ought to be allowed; for it is *pro bono publico*; and also it is but an easement, and therefore may be said to be belonging to passengers or inhabitants, or generally to all comers through the port. Look at the book of 8. E. 4. 18. for the custom of Kent, for fishermen to dry their nets upon the land, though it be the soil of private men.—*Pat. B. R. 2. part. 1. m. 83. Rex omnibus, &c. Ex clamosâ insinuatione totius comitatûs Nottingham accepimus, quòd cùm diversi homines ducentes diversa victualia et mercandisas cum navibus et batellis per aquam de Trent, in singulis placeis inter villas de Hull et Nottingham, totis temporibus retroactis, venire per eandem aquam, velando et navigando liberè redire, pro parvitate aquæ naves et batellos suos per lineas et cordas super terram ex utrâque parte aquæ prædictæ trahere consueverunt, quæ quidem aqua est ripariа vestra, et illo jure commune passagium pro cariagio et aliis necessariis in eâdem aquâ faciend. pro quibuscunque hominibus ibidem transeuntibus, &c. quidam homines, habentes terras suas adjacentes dictæ ripariæ ex utrâque parte aquæ prædictæ, diversos fines et redemptiones ac vadia singulis navibus et batellis ibidem venientibus ante hoc tempus ceperunt, et indies capere non desistunt, per quod quamplures hujusmodi homines illùc venire dissolerunt, et adhuc differunt; ita quòd diversa victualia ad magnum caristiam devenerunt, et quotidiè deveniunt in villâ ac castro Nottingham ad totius comitatûs prædicti damnum non modicum gravamen et depressionem manifestam: nos, hujusmodi damna gravissima et depressiones vitare et communi utilitate populi nostri circumcunque prospicere volentes, vobis omnibus et singulis districtûs, quo poterimus, sub forisfacturâ omnium quæ nobis forisfacere poteritis, inhibemus, ne aliquos victularios, victualia et alias mercandisas inter villas de Hull et Nottingham per aquam prædictam per vestros districtus in navibus seu batellis ducentes, impediatis, molestetis, seu in aliquo per fines redemptiones vadia vel alia gravamina contra justitiam inquietetis ullo modo, et hoc sub forisfacturâ prædictâ nullatenus omittatis.*—I have inserted the whole writ, because it well explains the nature of this liberty of towage; and accordingly, by the statute of the 23. H. 8. cap. 12. towage upon the river of Severn is declared to be free by custom time out of mind used, and a punishment enacted against the exactors of toll or taxes for the allowing of towage.

2. But yet we must needs say, that without a custom there may be something required as a recompence by the owner of the soil over which they go. But yet, 1. They ought to have a liberty of paying for it. 2. They ought to pay what is reasonable, and no excessive exaction ought to be taken

taken for ſuch permiſſion; for it is for the public good, and therefore ought not to be wholly obſtructed; and yet there is a private intereſt concerned, and therefore *de jure communi* without a ſpecial cuſtom to the contrary, the owner of the ſoil ought to receive compenſation for his damage. And this appears by the ſtatute of the 19. H. 7. cap. 18. for the free paſſage of boats in Severn, and the proviſo therein for the reaſonable ſatisfaction of the owners adjacent; but by the ſubſequent ſtatute of 23. H. 8. it is declared and enacted the paſſage ſhall be free without compenſation.

(8.) A port or public paſſage may not be obſtructed; nay, if it begins to be filled or ſtopped, yet it muſt be ſcoured, and cannot be wholly dammed or filled up, although another cut be made as beneficial as the former, without an inquiſition by writ of *ad quod damnum* finding it to be no damage to the publick, and the king's licence thereupon obtained; as appears by the writ of *ad quod damnum* cited formerly to another purpoſe. Regiſter 252.

Theſe be ſome of thoſe many nuſances which may happen in ports.—I proceed now to ſet down the means whereby they may be prevented or remedied, appointed or allowed by law.

And theſe proviſions are of two kinds:

I. By the common law.

II. By particular acts of parliament.

I. As to the proviſions by the common law we are to obſerve, that as the common law hath intruſted the king with the patronage and protection of the *jura publica*, as highways, public rivers, ports of the ſea, and the like; ſo the care of preventing and reforming of public nuſances therein is left to him, and his courts of juſtice, the proſecutions for them are in his name, and the fines for the defects or annoyances in them are part of his revenue.

By the common law the courſe touching nuſances in ports is of two kinds, proviſional or remedial.

(1.) The proviſional courſes to prevent theſe nuſances.

1. The king did many times iſſue out of the court of chancery mandates to the mayor and chief officers of ports to take care againſt them. *Vide in Cl.* 46. *E.* 3. *m.* 14. a mandate to the mayor and ſheriffs of London, that *finus fimaria et alia nociva ne proficiantur in rivum Thamiſiæ, ſed amoveantur in emendationem portûs.*

2. The king granted upon occaſion tolls for the repair of keys in ports, called *keyagium*, viz. certain rates of all ſorts of merchandize.

(2.) Remedial; and this may be done,

1. By the ports damnified.—Any man may juſtify the removal of a common nuſance, either at land or by water, becauſe

becauſe every man is concerned in it. *Vide Mich.* 13. 14. *E.* 1. *B. R. rot.* 10. The burgeſſes of Southampton juſtify the throwing down of a wear belonging to the abbot of Tichford in a creek of the ſea, *quia levata fuit ad nocumentum domini regis et villæ Southampton, et quòd battelli et naves impediantur quominùs venire poſſunt ad portum villæ*; and verdict and judgment for the defendant: but becauſe this many times occaſions tumults and diſorders, the beſt way to reform public nuſances is by the ordinary courts of juſtice.

2. By the king's courts,

1. If the nuſance be *infra corpus comitatûs*, the ordinary remedy is by indictment or preſentment in the king's courts, as in leets, turns, ſeſſions of the peace, oyer and terminer; and if the nuſance be where the king's bench is ſitting, then by preſentment there; if in another county, then upon the preſentment removed by certiorari into the king's bench, and proceeding thereupon, or by information by the king in any of his courts at Weſtminſter.—By the book of 8. E. 2. *Corone*, every arm or creek of the ſea within the *points* of the land, where a man may diſcern clearly from ſide to ſide, is within the body of the county. Yet the admiral hath uſed at leaſt a concurrent juriſdiction in many ſuch creeks and arms of the ſea, up to the firſt bridges as to matter of nuſances, upon a miſtake perchance of the words *les pounts* in the printed ſtatute of 16. R. 2. c. 3. whereas ſome read it *points*.

2. If not within the body of the county, but upon the high ſea, then theſe nuſances are rectified and redreſſed by the court of admiralty *ex officio*, as appears by the old articles of the admiralty *in libro nigro admirallitatis*.

II. Touching proviſions particularly made by act of parliament for particular ports, ſee the ſtatutes of 23. H. 8. c. 8. & 27. H. 8. c. 23. for the preſervation of the ports in Devon and Cornwall, principally in reference to damages that may occur by tin-works; the ſtatutes of 4. H. 7. c. 15. & 27. H. 8. c. 18. for avoiding and reforming nuſances in the port of London and river of Thames; 6. H. 8. c. 17. for the river of Canterbury; 23. Eliz. c. 6. &c. for Dover haven; 2. & 3. E. 6. c. 30. for the port of Rye and Winchelſea; 34. 35. H. 8. c. 9. for the port of Briſtol; 21. H. 8. c. 18. for the port of Newcaſtle; 11. H. 7. c. 5. & 14. 15. H. 8. c. 13. for the port of Southampton; 27. Eliz. c. 22. for the port of Chicheſter; 27. Eliz. c. 20. for the port of Plymouth; 31. H. 8. c. 4. for the port of Exeter.—34. 35. H. 8. c. 9. is generally againſt unloading any rubbiſh into any haven or river. See againſt exactions in ports or navigable rivers, *Rot. Parl.* 50. *E.* 3. *n.* 163.—19. H. 7. c. 18. & 23. H. 8. c. 12. are againſt exactions upon Severn.

CAP.

CAP. VIII.

Concerning the jus regium, *or the king's right of prerogative in ports of the ſea.*

I HAVE done with the *jus privatum* and *publicum* of ports.—I come to the king's right.

Touching the king's right of erection of ports, I have already declared at large, as alſo concerning his right of ownerſhip, either of franchiſe or propriety; for that right I call *jus privatum*, though it be lodged in the crown, becauſe that dominion is tranſferrable to a ſubject.

But the right that I am now ſpeaking of is ſuch a right that belongs to the king *jure prærogativæ*, and is a diſtinct right from that of propriety; for, as before I have ſaid, tho' the dominion either of franchiſe or propriety be lodged either by preſcription or charter in a ſubject, yet it is charged or affected with that *jus publicum* that belongs to all men; and ſo it is charged or affected with that *jus regium*, or right of prerogative of the king, ſo far as the ſame is by law inveſted in the king.

Now touching this *jus regium*, and what kind of prerogative the king hath in the ports of the ſea, and how far they extend, may be conſidered under theſe three relations:

I. How far forth the king's prerogative, or *jus regium*, extends, in order to the preſervation of the ſafety and peace of the kingdom.

II. How far forth they extend in relation to the trade and commerce of the kingdom.

III. How far forth they extend in relation to the improvement and due anſwering of the king's cuſtoms and ſubſidies ariſing by merchandize imported or exported.

And this will let me into what I principally intended in this whole collection, viz. the narrative or hiſtory of the cuſtoms, which will be the ſubject of the Third Part of this Diſcourſe.

I. And, firſt, I begin with the conſideration of the *jus regium*, or prerogative of the king, in order to the preſervation of the peace and ſafety of the kingdom, viz. inaſmuch as the ports of the kingdom are the *januæ* and *oſtia regni*, how far the king may by law open or ſhut theſe gates, in order to the peace and ſafety of the kingdom, or upon any ſurmiſe of any danger or inconveniency relating thereto. And as to this matter, I ſet down theſe things:

Firſt,

Firſt. What *de facto* was actually done in this kind:

Secondly, What might be done, as the laws and ſtatutes of the kingdom ſtand.

And as to the former, the exerciſe of this power was of two kinds:

(1.) The inhibiting of perſons to come into the realm.

(2.) The inhibiting of perſons to go out of the realm.

As to the former of theſe, theſe things were uſually done:

1. In time of hoſtility, there were frequent inhibitions by proclamation, that none of the nation in hoſtility ſhould come into the kingdom *ſine licentiâ regis ſpeciali*; and this was but reaſonable and neceſſary.

2. Even in times of peace, yet there were many times inhibitions reſtraining great perſons of a foreign kingdom to come into the realm. *Vide Clauſ.* 20. *H.* 3. *m.* 13. *dorſo*, mandates to the conſtable of Dover, the biſhop of Canterbury, and the ſheriffs of divers counties, *viz. Nolumus quòd aliquis magnus, qui ſit de poteſtate regis Franciæ, applicet in terrâ noſtrâ ſine licentiâ noſtrâ vel mandato noſtro ſpeciali; et tibi præcipimus, quòd non permittas de cætero aliquem magnatem, qui ſit de ipſius regis poteſtate, applicare; et ſi contigerit, ei ſcire facias quòd ſtatim revertatur.* And upon this account, when the emperor came hither to viſit the king of England, the hiſtorian tells us, that the earl of Glouceſter ran into the water with his drawn ſword, and withſtood his landing, till he had gotten the king's licence to arrive; becauſe he was an abſolute prince, and his acceſs might raiſe diſturbances here.

3. A kind of reſtrained inhibition, *ne intret in regnum Angliæ, ſecum deferens bullas, aut inſtrumenta, vel alia præjudicialia paci regni, vel juri regis.* And this was frequently done in caſes of the pope's agents, that ſometimes came with breves, interdictions, and other matters prejudicial to the king's intereſt and kingdom's peace. *Vide Clauſ.* 15. *H.* 3. *m.* 18. *dorſo*, *pro de Eynſham, et ſæpius alibi.*

But none of theſe inhibitions extended to merchants, unleſs in time of war. *Vide* the ſtatute of *Magna Carta*, *cap.* 30. But in time of hoſtility, then merchants alſo of the hoſtile country were not only forbidden to come in, but ſometimes commanded to depart out of the kingdom. *Vide Clauſ.* 15. *H.* 3. *m.* 19. *dorſo*, a proclamation, *quòd omnes mercatores de regno Franciæ exeant terram Angliæ* by a certain day.

Thus much ſhall ſerve touching the firſt kind of reſtriction. Now touching that other, viz. the reſtraint of perſons from going beyond the ſeas. And ſuch reſtrictions were often heretofore uſed, in order to the peace and ſafety of the kingdom; and they are of two kinds:

1. A ge-

1. A general reſtriction, which was ordinarily in times of public hoſtility and danger; and when that was the true end and uſe of it, it carried its own reaſon with it, and ſo all men reſted ſatisfied with it. But if at any time it were made an engine to gain money for licences, then it became diſtaſteful, and brought inconveniencies.

The end of theſe inhibitions were, either the better to apprehend and diſcover ſpies, or to prevent the diſcovery of the councils of the kingdom to foreign ſtates in hoſtility; or to prevent the ſupply of foreign ſtates in hoſtility, either with money, ammunition, or diſcontented ſoldiers that poſſibly would go over to be entertained. Theſe inhibitions *ne quis exeant regnum* were ſometimes extended to all perſons, and to all ports, not to paſs over ſeas without the king's licence; as *Cl.* 10. *H.* 3. *m.* 27. *dorſo. Clauſ.* 11. *H.* 3. *m.* 25. *dorſo. Clauſ.* 3. *E.* 3. *m.* 9. *dorſo.* Sometimes by ſuch proclamations all ports were not cloſed, but ſome one or ſome few eminent ports, where poſſibly a great viligance might be uſed, as Dover. *Clauſ.* 3. *E.* 3. *m.* 26. *dorſo, et ſæpiùs alibi.*

2. A ſpecial reſtriction. Such is that by the writ *de ſecuritate inveniendâ ne exeat regnum*, which concerns particular perſons; and though at this day, this writ is granted upon oath made before the chancellor in reference to civil cauſes, yet certainly the original inſtitution of this writ was in order to the ſafety of the kingdom, as appears by the ſuggeſtion of the writ; *quia datum eſt nobis intelligi, quòd tu verſus partes exteras abſque licentiâ noſtrâ clam deſtinas te divertere, et quamplurima nobis et coronæ noſtræ præjudicialia ibidem proſequi intendis, &c.* which though it be not traverſable, yet it is a good direction, what the end of that writ was, and how it ought to be uſed.

Thus far concerning the fact, what hath been uſed to be done in referrence to perſons.—It ſeems the law ſtands thus:

1. At common law any man might paſs the ſeas without licence; unleſs he were prohibited: therefore much more might merchants.

2. But at common law, the king might by his writ prohibit a perſon particularly from going beyond ſea without licence, by his writ of *ne exeat regnum*; and this may be done at this day. *Vide Fitz. N. B. fol.* 85. *Dy.* 165. 269.

3. At common law, in time of public danger, and *pro hâc vice*, there might be a general inhibition by proclamation, reſtraining any from going beyond ſea without licence.

4. But that was not to be made an engine to gain money, or reſtrain trade; but licences of right ought to be granted

to

to perſons upon whom there was no juſt ſuſpicion. Otherwiſe it was an injury to the people. And hitherto thoſe ſeveral petitions and conceſſions in parliament tend, viz. *que le mere ſoit overt. Vide Rot. Parl.* 18. *E.* 3. *n.* 10.—22. *E.* 3. *n.* 8. 25. *E.* 3. *n.* 22. And by the opinion of Fitzherbert, *N. B.* 85. this power ſtill remains, viz. in caſe of public danger, *& pro hâc vice.*

5. But as to merchants, as well natives as foreigners in amity, it ſeem this power at laſt of public inhibition was reſtrained by the ſtatute of *Magna Carta, cap.* 30. *Omnes mercatores, niſi publicè antea prohibiti fuerint, habeant ſalvum et ſecurum conductum exire de Angliâ et venire in Angliam, tam per terram quàm per aquam, ad emendum vel vendendum, ſine aliquibus malis tolnetis, &c.* wherein Sir Edward Coke takes obſervation, that public prohibitions, in reference to merchants, is not intended of prohibibition by proclamation, but by act of parliament. And this ſtatute of *Magna Carta* is much enforced by the ſtatutes of 2. E. 3. c. 9. 14. E. 3. c. 2. that all merchants-privies or ſtrangers may go and come with their merchandiſes into England after the tenor of the great charter, and divers other ſtatutes to the ſame purpoſe.

By the ſtatute of 5. R. 2. cap. 2. all men were inhibited to go beyond ſea without licence under pain of forfeiture of all their goods, except the lords and great men of the realm, and true and notable merchants, and the king's ſoldiers.

And this ſtatute continued long in force; and yet we find it doubted in Dy. *ubi ſupra*, whether without an expreſs inhibition it were a contempt to paſs the ſeas without licence.

But by the ſtatute of 4. Ja. cap. 1. this clauſe of the ſtatute of 5. R. 2. is repealed; ſo that at this day the law ſtands in all points as it did before the ſtatute of 5. R. 2.

There belongs to this part of the *jus regium* another ſort of inhibition, viz. the inhibition of the exportation of thoſe things, in which the ſtrength and ſafety of the kingdom was concerned; as the inhibition of the exporting of horſes, arms, bows, arrows, and the like offenſive and defenſive weapons, and proviſions of war. But theſe will more properly come under the ſecond generall, viz. the king's prerogative in ports of the ſea in relation to commerce and trade, which will be the ſubject of the next chapter.

CAP.

CAP. IX.

Concerning the jus regium *in ports of the ſea in relation to commerce and trade.*

I COME to the ſecond branch of the king's right in ports, viz. in relation to commerce; and I ſhall hold the ſame method therein as in the former.

That, wherein the exerciſe of this right is obſervable, is the power of opening or ſhutting of the ports in reference to goods exported or imported; and therein I ſhall conſider,

What *de facto* hath been done in this kind.

What *de jure* may be done therein.

As touching both the former and latter, for the more methodical proceeding therein there may be theſe two conſiderations:

(1.) The prerogative or power of the king in opening of the ports, where the law hath, as I may ſay, ſhut them; viz. when there is a prohibition by act of parliament of the importation or exportation of goods under pain of forfeiture. *Vide* 11. Rep. 88. Caſ. Monopolies. In that caſe, the king hath regularly power by a *non obſtante* though not *in toto*, to abrogate it, yet in particular caſes of particular quantities, or particular perſons, and for a determinate time, to diſpenſe with this law, and to open the ports, notwithſtanding this prohibition, but not to grant a general diſpenſation. *Vide tamen* ſtat. 26. H. 8. cap. 10. power given to the king to diſpenſe with ſtatutes of this nature. But becauſe this conſideration rather reſpects the prerogative of the king in diſpenſing with penal laws, and doth not ſo directly concern the buſineſs of the ports, I paſs this over.

(2.) The prerogative of the king in cloſing or ſhutting of the ports, and that under a double reſpect:

1. The cloſing of the ports againſt the importation of goods or merchandize.

2. The cloſing or ſhutting of the ports againſt the exportation of goods.

And I ſhall examine both theſe in their order.

1. And firſt, concerning importation of foreign goods, and the prohibition of the importation of them. We may find *de facto* that ſuch inhibitions have been of two ſorts, viz. general inhibitions that ſuch or ſuch merchandizes

ſhall

merchandizes ſhall not at all be imported, under pain of confiſcation or forfeiture; or elſe they have been inhibitions or reſtraints *ſub modo*; as, namely, they ſhall be imported only at ſuch ports or in ſuch ſhips.

Firſt, For general prohibitions of merchandizes of any particular kind. Theſe were ſometimes made, but very rarely: neither indeed could they be lawful without the help of an act of parliament, becauſe there have been in all times ſeveral ſtatutes made for the liberty and encouragement of merchants ſtrangers eſpecially to come into the kingdom and trade, which could not be derogated by a proclamation. *Magna Carta*, *cap.* 30 2. E. 3. c. 4. 9. E. 3. c. 1. 14. E. 3. c. 2. 25. E. 3. c. 2. and divers other ſtatutes.

And therefore, if at any time there were ſuch inhibitions by proclamation, they were commonly temporary upon an exigence of ſtate, and not perpetual, nor of any certain continuance. But when there were perpetual or long reſtraints of this nature, they were always done by parliament. 3. E. 4. c. 4. 1. R. 3. c. 12. 19. H. 7. c. 21. againſt importation of foreign manufactures therein ſpecified; 4. E. 4. c. 1. againſt importing of foreign cloaths; 5. Eliz. c. 7. againſt importation of daggers, &c.; 27. H. 6. c. 1. an inhibition of the wares of Brabant and Holland, becauſe they there had made reſtraint of importation of Engliſh cloth; 23. H. 8. c. 7. an inhibition by act of parliament of the importation of French wines between Michaelmas and Candlemas; and very many more of the like kind. And the reaſons of theſe interpoſings of acts of parliament was, becauſe that proclamations proved very ineffectual to that purpoſe, partly becauſe it was at beſt doubtful whether they could at all be effectual againſt ſo many acts of parliament; but doubtleſs they could not without an act of parliament induce a forfeiture of the goods ſo imported, as hath been often reſolved; whereof more hereafter. See the reſolution of the caſe of monopolies, 11 Rep. 88. the grant of the ſole importation of foreign cards, though prohibited by act of parliament, ruled to be againſt law, and a monopoly. Much more were the things not prohibited by law to be imported. *Vide* Peeth's caſe, *Rot. Parl.* 50. E. 3.

The only act of parliament, that ſeems to give a countenance to theſe kinds of inhibitions, is that of 3. Ja. c. 6. The king granted a charter to the merchants, that no Spaniſh wines ſhould be imported but by them. This act repealed that charter in a great meaſure, whereby ſome would infer that the patent was good, ſince nothing but an act of parliament ſeemed neceſſary to repeal it. But the conſequence is miſtaken. *In majorem*

jorem cautelam, an act of parliament was uſed in this caſe as the moſt ſafe and effectual means: but if any man conſider thoſe acts of parliament, that enact the ſea to be open, or the reſolutions of court in caſes of this nature, or the very preamble of the actitſelf, he will eaſily find that ſuch inhibitions cannot be without an act of parliament.

Secondly, as touching particular reſtraints; as, for inſtance, that malmſeys ſhall not be imported, but unto the port of Southampton; ſuch a grant is againſt law, and was accordingly reſolved in the caſe of Southampton, *T.* 1. *Eliz. Rot.* 73. cited in Cooke's comment upon *Magna Carta*, *c.* 30. and therefore there was a ſpecial act of parliament made the 5. Eliz. for the making good of that charter; and the like courſe hath been uſed to make good thoſe reſtrictions of foreign trade to particular companies; as, for inſtance, the Muſcovy company, and ſome others.

And thus much briefly touching the point of the prerogative in reference to imported goods, and how it ſtands limited by law.

2. Concerning exportation, and how far forth the ports may be ſhut in reference to goods and merchandizes exported, both the *quid facti* and the *quid juris* therein. Theſe prohibitions of exportation were never generally of all goods; for that were to deſtroy trade, but of ſome particular goods and merchandizes. And thoſe reſtraints were of two kinds, viz. general reſtraints, that they ſhould not be at all exported; or ſpecial and qualified reſtraints, that they ſhould not be exported, but in ſuch ſhips, or at ſuch places. Touching both theſe briefly: and firſt, touching the general inhibitions.

It is certain, that inhibitions of this nature were very frequent by proclamation; and when they carried with them the apparent reaſonableneſs and fitneſs of the inhibition, they were not much diſputed. Thoſe inhibitions were for the moſt part touching ſuch commodities whereby the kingdom might be weakened, or ſcarcity occaſioned, by the exportation: as arms, ammunition, corn, victuals, gold, ſilver, horſes, timber, thread of yarn or woollen, and ſometimes of falcons. *Vide Clauſ.* 10. *E.* 2. *m.* 13. *dorſo. Clauſ.* 38. *E.* 3. *m.* 29. *Clauſ.* 41. *E.* 3. *m.* 24. *dorſo Clauſ.* 43. *E.* 3. *m.* 3. *dorſo. Cl.* 45. *E.* 3. *m.* 4. *dorſo.* And ſometimes in the proclamation there was annexed a clauſe of impriſonment of offenders; ſometimes the forfeiture of the things imported; ſometimes the forfeiture of all their goods and chattels. But theſe clauſes of forfeiture were only *in terrorem*; for, as we have before obſerved, a proclamation barely cannot induce a forfeiture of goods. But yet ſometimes the ſearchers and other officers did ſeize the goods; and when they had ſo done, they were compelled to account for the goods ſo

ſeized

ſeized in the exchequer; and the parties, whoſe goods were ſo ſeized, were put to much trouble, before they could have their goods again. But the moſt uſual way to puniſh offenders againſt ſuch proclamations was by fine and impriſonment; for where the king may by law prohibit, the proclamation doth increaſe the offence. And theſe proceedings were by information at the king's ſuit, ſometimes in the king's bench, as *H.* 1. *E.* 2. *B. R. rot.* 38. againſt ſuch as exported horſes, arms, money, and plate, againſt the king's proclamation; ſometimes in the exchequer, *Communia Trin.* 16. *E.* 3. *rot. mich.* 19. *E.* 3. *rot. clauſ.* 64. *m.* 29. and ſometimies *coram concilio*, viz. in chancery.

How far theſe proclamations might be warrantable by law in theſe particular caſes, I ſhall not poſitively determine; only thus far I ſhall ſay,

Firſt, that if it were admitted, that in theſe particular caſes of arms, ammunition, victuals, and money, ſuch proclamations might be made, and thereby the offenders might be ſubject to fine and impriſonment; yet it could not be extended to other things, neither ought or might this inhibition be an engine to gain money for licences. For if the proclamation had any ſtrength, it was becauſe of the inconveniences of the exportation of theſe things. If it were not a public inconveniency, it could not be inhibited barely by proclamation; and if it were a public inconveniency, it might not be licenſed for private profit. If it might, the ſtrength of the proclamation would conſequently ceaſe.

Secondly, if theſe proclamations were admitted lawful; yet they could not induce any forfeiture of lands or goods, or of the very goods ſo exported againſt that inhibition; becauſe that lyes not within the ſtrength of any thing but a law.

Thirdly, though poſſibly in the time of hoſtility, or public danger, or common ſcarcity, ſuch prohibitions by proclamation of exportation of victuals and arms, might have a temporary effect and uſe; yet we may eaſily gueſs that they were not effectual for perpetuity, nor indeed ſufficient proviſions *pro tempore*; for the king and his council thought not fit to reſt upon ſuch ineffectual means, but acts of parliament have ſucceſſively paſſed for the inhibition of exportation of theſe very things, with penalties of forfeitures added to them. See 1. E. 4. c. 5. for horſes; 1. E. 2. P. M. c. 5. of corn, herring, butter, cheeſe, and wood; 25. H. 8. cap. 2. of victuals of all ſorts; 9. E. 3. cap. 1. 19. H. 7. cap. 15. of bullion or money. The like might be inſtanced in divers other things.

Let us now come to particulars, or qualified reſtraints, and they are of two kinds;

Firſt,

Firſt, The reſtraints of exportation in any but Engliſh bottoms. This hath been attempted to be done by proclamation, as a good expedient for the increaſe of ſhipping and mariners, and the encouragement of trade and navigation. *Vide inde Clauſ.* 41. *E.* 3. *m.* 25. of a proclamation to that purpoſe; but it proved ineffectual, till proviſion was made for it by acts of parliament, viz. 5. R. 2. c. 3.—6. R. 2. c. 8.—14. R. 2. c. 6.—4. H. 7. c. 10. But becauſe it provoked foreign princes to do the like, it was repealed by the ſtatute 1. Eliz. c. 13. with certain proviſions made in the caſe by that ſtatute and the ſtatutes of 5. Eliz. c. 5. and 13. Eliz. c. 15. But now, by a late act of parliament, 12. Car. 2. intitled, "An act for encouraging of navigation," the uſe of foreign ſhips is in a great meaſure reſtrained.

Secondly, The reſtraint of exportation in any but from certain ſpecial ports, viz. the ſtaples; whereof, and of their progreſs and ceſſation, in the next chapter, becauſe it relates in a ſpecial manner to the buſineſs of the cuſtoms.

And thus I have paſſed through the conſideration of the king's prerogative in ports, for their opening and ſhutting in relation to trade and commerce. And upon the whole matter, it will appear from the ſeveral acts of parliament that have been made for the ſupport and increaſe of trade, and for the keeping of the ſea open to foreign and Engliſh merchants and merchandize, that there is now no other means for the reſtraint of exportation or importation of goods and merchandizes in times of peace, but only when and where an act of parliament puts any reſtraint. Several acts of parliament having provided, *que la mere ſoit overt*, it may not be regularly ſhut againſt the merchandize of Engliſh, or foreigners in amity with this crown, unleſs an act of parliament ſhut it, as it hath been done in ſome particular caſes, and may be done in others.

CAP. X.

Concerning the jus regium *in the ports, with relation to the cuſtoms.*

WE come now to the third relation of this *jus regium* in the ports of the ſea, viz. the relation to the cuſtoms, and the exerciſe of the prerogative in the ports, under that relation. And this will be examined in theſe conſiderations.

I. How

I. How far forth the king did *de facto*, and might *de jure*, limit the ports of exportation of cuſtomable goods, wherein his cuſtoms might be anſwered.

II. How far he did and might ſettle in all ports ſuch means or conducibles, as might be for the due anſwering of his cuſtoms. And herein,

(1.) Of the officers of the cuſtom-houſe, and their fees.

(2.) Of the means to diſcover the certain weight of merchandize; and therein of tronage.

(3.) The means to diſcover whether the cuſtoms were anſwered; and therein touching the cockets and certificates.

I. As to the firſt of theſe, viz. the limiting of ports wherein cuſtomable goods ſhould be laden and unladen, I will conſider theſe two things, viz.

(1.) How it ſtood as to this matter anciently.

(2.) How it ſtands at this day.

(1.) As to the former of theſe conſiderations, it is plain, that from the beginning of Edward the firſt, until the time of Edward the third, there were few or no cuſtoms, but the great cuſtom of wools, woolfells, and leather, and the petty cuſtoms anſwered by merchants-ſtrangers, expreſſed in the contract or *Carta Mercatoria* of 31. E. 1. But the great and conſiderable revenue was that of the great cuſtoms.

For the better and more regular anſwering of theſe cuſtoms it was thought fit, that there ſhould be certain towns and ports aſſigned for the venting of theſe merchandizes of wools, woolfells, and leather, where the king might have his cuſtom-houſe officers ſettled, for the receipt of the cuſtoms. And the king had a great advantage in his hands to bring this to paſs; becauſe the exporter, if he had not a cocket teſtifying the paying of his cuſtoms, the wools and leather ſo exported were ſubject to be forfeited, and ſeized as forfeit: ſo that there was no ſafe tranſporting of theſe commodities, but in ſuch ports where this cocket, and the king's ſeal, with which it was to be ſealed, was lodged.

But on the other ſide, as it concerned the king to ſecure his cuſtoms, ſo it concerned him, that the trade might not be obſtructed; for that muſt of neceſſity impair his revenue of the cuſtoms; and therefore there was no great fear, that the trade would be confined to fewer ports, than ſtood with the abſolute neceſſity of the ſecuring of the cuſtoms.

The limiting of the ports wherein the king's cuſtoms were to be anſwered, were of two kinds, viz.

1. The *ſpecial* limitation of ports in relation to particular merchandizes.

2. The *general* limitation of ports of importation and exportation, in reference to all cuſtomable goods.

1. Touching

1. Touching the former of these it is regularly true, that the king might not, without an act of parliament, restrain the importation or exportation of goods to particular ports; and the reason is, because regularly all publick ports are free and *juris publici*. And therefore, when there was a grant to the bailiff and burgesses of Southampton, by queen Mary, that no malmseys should be imported at any port but Southampton, under pain of payment of treble custom; it was resolved, first, that this restraint was against law; secondly, that the assessment of treble custom was also against law. Cooke on *Magna Carta*, *cap.* 30. pag. 61. Yet it is certain, that *de facto* in order to the better answering of the king's customs, there were certain ports of exportation limited for the merchandizes of the staple, which were called staples or ports of the staple, which were used before they were settled by the parliament, but with great unquietness until they were settled by the parliament, viz. 27. E. 3.

The merchandizes of the staples were wool, woolfells, leather, lead, and tin, as appears by the statutes of 27. E. 3. c. 1.—21. R. 2. c. 17. and divers others. The first institution of the staples, viz. settled places for the market and ports for the exportation of these staples commodities, began thus:

Rot. Parl. 6. *E.* 2. *p.* 2. *m.* 5. the king issued a commission to divers merchants, to appoint certain staple ports, and ordinances for those staples, with certain penalties imposed upon such as did not submit to it.

Clauf. 3. *E.* 2. *m.* 1. *dorso*, strict commissions issued to inquire touching offenders against the constitutions of the staple, which were made, as appears, in pursuance of the former commission.

Clauf. 2. *E.* 3. *m.* 24. there issued a proclamation bearing test 1 May, 1. E. 3. wherein the ordinances of the staple made in the time of king Edward 2. are reinforced; the several ports in England, Ireland, and Wales, for the exportation of staple commodities are appointed; and several provisions against offenders.

After, this being contrary to the statute of *Magna Charta*, especially as to merchants-strangers, it is enacted by the statute of 2. E. 3. c. 9. that all staples on this side, and beyond the sea do cease. After this, there was a great liberty of this trade continued for a pretty while; insomuch that when the merchants, by a kind of combination, had settled a kind of staple at Bruges, it was decryed by the king's proclamation. *Pat.* 6. *E.* 3. *m.* 2.

But notwithstanding this statute, and although divers other statutes, and especially 9. E. 3. c. 2. and the 25. E. 3. c. 2. enacted a free market, especially to merchants and strangers; yet, the usefulness and conveniency of staples appearing, they were again resettled by proclamation, as well on this side, as

beyond the ſea; as appears *Rot. Parl.* 17. *E.* 3. *n.* 58.—21. *E.* 3. *n.* 10.—22. *E.* 3. *n.* 13. But a proclamation was too feeble a bottom for a buſineſs of this importance to commerce and the king's cuſtoms; and therefore an act of parliament was made for the ſettling of the ſtaples, both for the market and exportation of ſtaple commodities, viz. 27. E. 3. c. 1. *et ſequentibus*; and then it was fixed, and ſo continued for a long time under thoſe various alterations that were introduced therein by ſeveral ſubſequent laws; till at length theſe ſtaples became diſuſed and antiquated.

Beſides theſe ſtaples, I find ſometimes ſpecial reſtrictions of the paſſage of cuſtomable merchandizes at particular ports, eſpecially as to woolfells and leather, out of which the great cuſtoms aroſe; and this the king had a great opportunity to do, by fixing the ſeal called the cocket, without which theſe goods were not ſuffered to paſs unto ſome particular ports. See accordingly *Clauſ.* 5. *E.* 3. *p.* 1. *m.* 12. *dorſo.* The king, having placed his cocket in particular ports therein mentioned, iſſued a proclamation, that no wools ſhould be tranſported but at thoſe ports *ubi ſigillum noſtrum quod dicitur cockquet et tronum noſtrum deputantur*, viz. Newcaſtle, Kingſton-upon-Hull, St. Botolph's, Lyme, Yarmouth, Ipſwich, London, Southampton, Chicheſter, Melcomb, Exeter, Hartlepoole, Sandwich; which was in effect nothing elſe but a ſtaple, but not ſo called becauſe of the late ſtatute of the 2. E. 3. that took them away.

But this was againſt the great charter, of which the ſtatute of 18. E. 3. c. 3. *que le mere ſoit overt* is but declarative; and therefore the erection of thoſe excluſive ports by the ſtatutes of 27. E. 3. c. 1. of the ſtaple was requiſite. Otherwiſe it might not have been legally done; for as well as ſome ports might be inhibited, more might be inhibited, which might much impair the trade of the kingdom. See the petition in parliament, 6. H. 4. n. 54. againſt the reſtraint of the ſhipping of wools at Ipſwich, to their great diſeaſe and deſtruction, and the danger of the loſs of their wools, and the diminution of the king's cuſtoms.

Thus much ſhall ſerve touching the particular limitation of ports, in reference to particular merchandizes.

2. The *general* limitation of the ports for the importation and exportation, was made firſt by the ſtatute of 4. H. 4. cap. 20. to great ports, and after by the act of parliament of 1. Eliz. c. 11. And indeed without an act of parliament ſuch a limitation could not be, for it is againſt the liberty and *jus publicum* of ports.

By

By the latter ſtatute it was enacted, that no ſhip be laden or unladen, but in ſome open place aſſigned by the queen's commiſſion in the ports of London, Southampton, Briſtol, Cheſter, and Newcaſtle, and in ſome open key or wharf in all other ports havens creeks or roads, Hull only excepted, where a cuſtomer comptroller and ſearcher had been for ten years laſt reſident, or ſhould be reſident.

And thus much ſhall ſerve touching the *jus regium* in ports, viz. to open ſhut or limit them in relation to the cuſtoms.

CAP. XI.

Touching the officers of the cuſtoms attending the cuſtoms; the tronage, or king's beam; and the cocket, or certificate of cuſtoms paid.

BEFORE I can leave the buſineſs of the king's ports, and the relations they have to the cuſtoms, I muſt give ſome obſervations touching theſe three matters, viz.

I. The officers of the king's cuſtoms.

II. The *tronum*, or tronage.

III. The cocket and certificate teſtifying the payment of the cuſtoms.

I. In every great port in England or Wales, there have been anciently, and ſtill are, three great officers, viz. the collector, comptroller, and ſearcher; beſides other petty ſubordinate officers, viz. land-waiters and tides-men. But in the port of London, beſides theſe officers, there is a new-erected officer, viz. the ſurveyor of the cuſtoms.

II. Touching tronage, peſage, &c. the king being anciently anſwered ſome cuſtoms that were with relation to weight, viz. the ſacks of wool that anſwered by weight, and ſome cuſtoms of merchants-ſtrangers which were anſwered by weight, there were two kinds of officers, which yet were commonly united in one perſon in every port, viz. *tronagium*, which was the ſcale and weights for wool; and *peſagium*, which was in reference to averdupoiſe.

Touching the *tronagium lanarum*, it was oftentimes in farm, ſometimes granted to the ports wherein it was exerciſed, ſometimes exerciſed by a particular officer appointed thereunto; but when it was not under grant or farm, commonly the government of it was under the collector of the great cuſtoms in every port; and, together with the account of his collection of the great cuſtoms,

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toms, he gave an account alſo of the profits of the tronage; as appears in the accompts of the cuſtoms, in the times of king Edward the firſt, Edward the ſecond, Edward the third, in the pipe, which I have peruſed.

It appears by thoſe accompts that this office, as well as that of the cuſtomer, comptroller, and ſearcher, was in the king's diſpoſal. That which was anſwered to the crown for tronage, did differ in ſeveral parts; but ordinarily it did not exceed 2 *d. ob.* for every ſack of wool, or for every merchant that weighed his wool; and in ſome ports it was anſwered by the ſack; as in Cheſter, *de quolibet ſacco lanæ unum quadrantem.*

The entry of the collector's account in relation to tronage did commonly run thus:

Et reſpondet de 51. *provenientibus de tronagio prædictarum lanarum, viz. de quolibet ſacco integro* 2 *d. ob.* Thus it was anſwered in the ports of London, Lyme, Boſton, &c. but in Cheſter, *de quolibet ſacco unum quadrantem.*

And thus much briefly of tronage.

III. Touching cocquets and certificates, theſe are teſtimonials from the officers above ſtairs, viz. the cuſtomer and comptroller, that the king's duties were paid; without which the ſearcher, whoſe office it was to clear the ſhip, would not give liberty to a ſhip to paſs; for the want of theſe was in effect a forfeiture, ſometimes of the ſhip itſelf, but commonly of the cuſtomable goods that were laid on board without this certificate. This, though it might properly ſeem to belong to the Third Part of this tract, which concerns the cuſtoms themſelves; yet, becauſe it impoſeth a kind of reſtraint upon the liberty of the port with relation to the cuſtoms, it may come in proper enough here, and be preparatory to the conſideration of the buſineſs of the cuſtoms.

Firſt, touching the cocquet. This was nothing elſe but a teſtimonial, that the cuſtoms outwards due to the king are paid.

The cocquet began with the great cuſtoms of wools, woolfells, and leather; for there were no other goods that paid cuſtoms outwards anciently but theſe; neither was there any other goods cocquetted but theſe; inſomuch that theſe great cuſtoms in many records are called the cocquet, or cuſtom of the cocquet: for then there were no other goods neceſſary to be cocquetted. And therefore it was a great miſtake in the beginning of the late king's time, when there was no ſubſidy of tonnage and poundage ſettled, to think, that the not cocquetting of any goods, other than wools, woolfells, and leather, ſhould be a forfeiture of them, or a ground in law to ſtay them from paſſage outward; for moſt clearly the cocquet was only neceſſary where there were cuſtoms due by law.

But

But when other goods were charged by act of parliament with subsidies outwards, then indeed the cocquet was requisite as well for other goods as for wools, woolfells, and leather.

Touching the cocquet as it stood anciently, when the customs of wools, woolfells, and leather, were in use, we will consider,

(1.) The form of it.

(2.) The seal.

(3.) The fee.

(1st.) The form of it anciently ran in Latin in the king's name, viz.

Edwardus omnibus, ad quos, salutem. Sciatis, quòd J. S. *nobis solvit in portu nostro London. custumas nobis debitas pro tribus saccis lanæ, quo quietus est, testibus collectore & contrarotatore custumarum nostrarum in portu prædicto die anno, &c.* And these words in the conclusion, *quo quietus, &c.* gave it the name of the cocquet.

This was subscribed by the collector and comptroller of the port, sealed with the cocquet seal, and delivered to the master of the ship or the merchant, and was the warrant to the searcher to clear off the ship.

And the form of the cocquet at this day for that leather that is transportable by law, continues still in the king's name, though in English. But for other merchandises outward it is altered, as shall be shewn in its place.

(2.) The seal.—The king usually in these ancient times sent out of the exchequer a particular seal of his own for the sealing of these cocquets, which was called *sigillum de cocketto*, and commonly in those elder times rested in the hands of the comptroller of the customs.

(3.) Upon the cocquet of wools, woolfells, and leather, there was anciently answered to the crown a certain duty, for which the collector for the customs answered upon his account under the title of *exitus de cocketto*. *Vide* stat. 4. H. 4. c. 21.; 14. H. 6. c. 15.; and sometimes *exitus sigilli, quod vocatur cocquett*; which was most commonly 2*d.* of every merchant transporting wools, woolfells, or leather, as appears in the customer's accounts in the pipe, *sub annis Ed.* 1. 2. *et* 3. and commonly immediately succeeded his account of the customs, viz.

Et respondet de 5 l. *de exitibus de cocketto dictarum lanarum, viz.* 2*d. de quolibet mercatore lanas pellas lamitas vel coria habente, exeuntia de portu prædicto in aliquâ nave.* But in some ports it was 2*d. ob.*

But divers statutes having inhibited the exportation of wools, woolfells, and leather, it seems this duty hath been antiquated ever since the time of *E.* 3. Only, as before, for such leather as is transportable

tranſportable by licence or act of parliament, the old cocquet continues. And thus much for the old cocquet.

At this day, and for many years, all or moſt part of goods outward as well as inward are charged with ſubſidy of tonnage or poundage; and therefore all goods exported muſt have a cocquet to teſtify the payment or ſecurity for the duties chargeable upon them, or otherwiſe they are ſeizable.

But theſe cocquets are not now made in the king's name, nor under the king's ſeal, but are ſealed with the officer's ſeal, and ſubſcribed by the collector and comptroller, and one of the commiſſioners for the cuſtoms, or their deputy if in commiſſion; or by the collector and comptroller, or ſome of the farmers, or their deputy if in farm.

The cocquets at this day are of three kinds, viz. ordinary cocquets, parcel-cocquets, or coaſt-cocquets.

The common or ordinary cocquets run thus:

London. "Know ye, that *J. S.* 15 April 1664, hath "laden aboard the Mayflower, *T. S.* maſter, twenty Spaniſh "cloths for Fluſhing, for all which the king's duties are fully "paid. Witneſs our hands and the ſeal of our office, this "16 April 1664."

Subſcribed by the officers of the cuſtom-houſe, and one of the farmers or commiſſioners.

A parcel-cocquet is granted, where goods entered outward are not all ſhipped upon the ſame ſhip, but the ſearcher indorſeth what part of them were; and then the cocquet is brought back and kept by the officers that granted it, and a new cocquet made for ſo much only as was ſhipped upon the firſt ſhip, and a third cocquet is granted for the remaining part, as ſuch merchant ſhall pleaſe; and the firſt cocquet is marked (1), the ſecond (2), the third (3).

A coaſt-cocquet is granted, where native commodities are ſent from one port to another within the realm; becauſe in ſuch caſe no cuſtom or ſubſidy is due. Yet becauſe when they are laden aboard, they may be tranſported to foreign parts, there is bond given for the unlading at the other port of diſcharge within the kingdom, and then a cocquet granted; and upon return of certificate that the goods are unladen in that other port, the bond is delivered up. Though ordinarily, if they are ſmall parcels, or ſuch as commonly not intendible to be ſent beyond ſea, they paſs by a warrant, which is called a *tranſire*; viz.

"Suffer *J. S.* to paſs a hundred pound weight of grocery-"wares to Colcheſter in the Bonadventure of London, *J. G.* "maſter. Dated at the Cuſtom-houſe, 21 Nov. 1694."

Sub-

Subſcribed by the collector, comptroller, and one of the commiſſioners. Sealed.

Thus much concerning the cocquet, which is properly in reference to goods cuſtomable outwards.

A word concerning certificates, which properly concern foreign goods, or goods imported that pay cuſtoms inwards. Theſe certificates are of two kinds:

1. Certificates for the advantage of the merchant. By the rules formerly ſet and at this day in force, merchants, having paid their cuſtoms inwards, if they export the ſame into foreign ports, have an allowance of part of their cuſtoms and ſubſidy. *Vide* the 2d and 4th rule of the book of rates. And in ſuch caſes they ought to have certificates of their payments inwards, to the end they may have their repayment according to the proportion of their cuſtoms.

2. Certificates for the advantage of the king, that he may not be deceived. If foreign goods cuſtomable are imported into one port and pay there their cuſtoms, if they are afterwards tranſported to another port within the kingdom, they ought not to be chargeable a ſecond time with their cuſtoms upon importation into the ſecond port; and to the end the king may not be deceived in both places, by the ſtatute of 3. H. 7. c. 7. if goods be diſcharged or put to ſale in any other port than where they are firſt entered, without a certificate of the nature of the goods and that the cuſtoms are paid, the goods are forfeit.

Upon this ſtatute it hath been uſed in the out-ports, that if foreign goods are imported and after ſent away by water in ſhips or lighters to any port within the realm, in whole caſk or in the ſame package by which they were imported, the officers of the cuſtom-houſe refuſe to let them paſs, but by certificate teſtifying the payment of the cuſtoms; and therefore have required ſatisfaction, by oath or otherwiſe, that the cuſtoms were paid: but if in broken or ſmall parcels, they have uſed to paſs them by *tranſire*, without ſuch atteſtation or certificate. But in the port of London they repaſs all goods once landed unto any port in England by *tranſire*, or let-paſs, without any taking notice whether the cuſtoms are paid or not; which ſeems to be juſt and warrantable as to foreign goods; becauſe, if once landed and cuſtom paid, no new cuſtom is due, whether exported beyond ſea or to any port here.

AN APPENDIX.

CAP. XII.

Concerning the five ports; their names, privileges, and charges.

BECAUSE the cinque ports are at leaſt have been the noted and famous ports of this kingdom, endued with great immunities, it ſhall not be amiſs to add ſomething by way of appendix to the former diſcourſe concerning them, which at leaſt in point of hiſtory may be of ſome uſe. And herein I ſhall conſider,

I. The places or ports themſelves, and their members.

II. Their burthens, and charges or ſervices.

III. Their privileges and liberties.

I. Touching the firſt general head, the cinque ports and their members are ſet forth in ſeveral records and monuments. That, which I ſhall follow principally, is that old book of Sandwich before mentioned, wherein beſides the particular matters relating to that port, are contained moſt of the principal matters relating in general to the cinque ports. The firſt, viz. Haſtings, lyes in Suſſex, the reſt in Kent. They are theſe:

1. Haſtings, *ad quem pertinent* 10 *membra, viz. unus vicus qui dicitur littus maris in feſtedia* *, *Pevenneſel, Burwareheth, Hydency, Winchelſea, Rya, Yahanne, Bekeſborne, et Grenheth* †; but according to a later account, *Pevenſey, Seaford, Bulver-Hythe, Petit-Iham, Hindin, Bekiſborn, Grenge.*

2. Ramenhale, *ad quem pertinent Prouchelle, Lyde, Oſwarſton, Dengemareis, Vetus Romenale*; according to a later account, *Bromhil, Ledd, Old Rumney, Dengimarſh, Overelſton.*

3. Hetha, *ad quem pertinet Weſthethe.*

4. Dover, *ad quem pertinent Folkeſton, Feverſham, Margate non de ſolo ſed de cattallis et de novo conceſſo, Kingſdown non de ſolo ſed de cattallis*; according to a later account are added,

* This word is in the manuſcript, but its import I know not. In Lambarde's Kent and Jeakes's Cinque Ports the firſt member of Haſtings is deſcribed to be *littus maris in* SEAFORD, inſtead of *feſtedia*. Perhaps, therefore, the latter word is a miſtake of the tranſcriber.——EDITOR.

† One of the ten members profeſſed to be enumerated is omitted. This may be ſupplied by adding *Northie*, which is one of the ten mentioned by Mr. Lambarde. See Lamb. Peramb. of Kent, ed. 1596. p. 121.——EDITOR.

St.

St. John's, Gorend, Burchington, Woodchurch, St. Peter's, and *Ringward.*

5. Sandwich, *ad quem pertinent Fordewicus Recolvea, quod quondam fuit Serre, Stonoredale non de ſolo ſed de cattallis et de novo conceſſo, Walmere, Ramſgate; iſti ſunt non de ſolo ſed de cattallis*; and according to the later account, *Foreditch, Deale, Walme, Ramſgate, Stonar, Serre, Brightlington.*

II. As to their ſervices, they were of two kinds, viz. their honorary ſervices, and their ſervices in defence of the realm. A word touching either.

(1.) Their honorary ſervices were of two kinds; 1. At the coronation of the king or queen, or both; 2. At the parliament.

1. At the coronation the ſolemnity of their ſervice was thus. *Firſt*, the ſummons and ſervice for the coronation was and ought to be forty days before it be performed; and one of theſe writs ought to be directed to the warden of the cinque ports. *Secondly*, the writ being received, the barons of the cinque ports meet at Brodhul; and there, if the king and queen be both crowned together, they chuſe 32 barons, if one alone then 16 barons, to perform the ſervice for the five ports, who were to habit or clothe themſelves at their own charge, but their ſtay at court was to be at the common charge of the five ports. *Thirdly*, at the day of coronation there was to be a purple canopy carried over the king, and another over the queen if ſhe were to be crowned alſo, each canopy to be born up with four ſilver ſtaves, and upon the top of every ſtaff a ſilver bell, and each ſtaff was to be carried by four of the barons of the five ports, viz. 16 to every canopy. *Fourthly*, after the coronation made, when the king dines in the great hall, the barons of the five ports are to have a table to themſelves on the right hand of the king for themſelves and the reſt of the barons of the five ports that will be preſent. *Fifthly*, all being performed, the canopy ſtaves and bells are the fees belonging to the barons of the five ports; and if there be two ſuch canopies, the barons of the port of Haſtings are to have one, which they give to the Church of Chicheſter; and the reſt of the barons the other, which they give to the church of St. Thomas of Canterbury; and divide the bells and ſtaves among themſelves.

2. Their ſecond ſort of honorary ſervice is in parliament. Upon ſummons directed to the warden of the five ports, each of the ports ſend two barons to the parliament, which ſit there by the name of *barones quinque portuum.*

(2.) I come to their naval ſervices in defence of the realm and coaſt, which the barons of the ſeveral ports are bound to provide at the ſummons of their ſervice by writ under the great ſeal, which ought to iſſue forty days before the ſervice and rendezvous appointed.

1. The port of Haſtings with its members are to find 21 ſhips, and in every ſhip 21 men.

2. The port of Ramenale with its members are to find 5 ſhips, in every ſhip 21 men.

3. The port of Hethe with its members are to find 5 ſhips, in each ſhip 21 men.

4. The port of Dover with its members are to find 21 ſhips, in each ſhip 21 men.

5. The port of Sandwich *cum membris* are to find 5 ſhips, and in each ſhip 21 men.

In the whole 57 ſhips.

Thus their ſervice is recorded in that old book of Sandwich, and in the red book of the exchequer fol. 196.

Upon the ſummons, theſe ſhips ought to continue in the king's ſervice at the reſpective charge of the ports by the ſpace of fifteen days, the firſt day being reckoned the day wherein they ſet ſail to the general rendezvous.

But if the king need their ſervice longer, they are to be at the king's charge, which is particularly inſerted in the red book, viz. 6d. *per diem* to the maſter, 6d. *per diem* to the captain *conſtabulario*, and 3d. *per diem* to every other.

The diſtribution of the groſs charge of the ports upon their members was aſcertained by cuſtom.

The means of bearing the charge was by contribution of the ſeveral inhabitants of the ports *ſecundùm facultates*; and this was ſo ſettled by the charter of 26. Ed. 1. viz. *quòd omnes illi de quinque portubus prædictis, et alii quicunque advocantes ſe de libertate eorundem et eâ gaudere volentes, contribuant, viz. quilibet eorum juxta facultates.* This charter was confirmed *Rot. Pat.* 1. *E.* 3. *p.* 1. *m.* 24. And further it was granted by aſſent of parliament, *quòd omnes illi de quinque portubus, et alii quicunque advocantes ſe de libertate eorundem et inde gaudere volentes, contribuant ad navigium et ſervicium prædictum faciendum et manutenendum, de omnibus bonis et cattallis ſuis tam extra libertatem quinque portuum quàm infra: et ad hoc per majores et jurates quinque portuum prædictorum, et etiam per conſtabularium noſtrum Dover, ſi neceſſe fuerit, debitè compellantur*; and alſo, that as well their foreign goods as their goods within the ports ſhould contribute to the tallages ſet upon theſe ports; which

was

was another charge that lay upon theſe ports, viz. tallage; which was in uſe before the ſtat. of 25. *E.* 1. *de tallagio non concedendo*, viz. the king was uſed to tallage his own ancient demeſnes, and among theſe the five ports, or at leaſt all of them but Sandwich, which, as hath been formerly ſhewn, was not part of the king's ancient demeſnes, but came to him by exchange with the archbiſhop of Canterbury.

And thus much concerning the charges of the cinque ports. Therefore,

III. In the next place, concerning their immunities and privileges.—Some they had by preſcription or cuſtom; others they had by charter; though for the moſt part their cuſtomary privileges were recited and confirmed, and others granted by charter. I ſhall therefore in the firſt place mention their principal charters, and then make ſome obſervations upon them relating to their liberties and privileges.

Their charters were many and ancient; but the principal and moſt comprehenſive were two charters granted by Ed. 1. both which are exemplified and confirmed 1ma. *Par. Pat.* 5. *E.* 3. *m.* 27.

The former, granted 17 Jan. 6. E. 1. whereby their ancient liberties are confirmed, and farther liberties granted, viz.

Quòd quieti ſint de omni theolonio et omni conſuetudine, viz. laſtagio, ſtallagio, paſſagio, cariagio, rivagio, ſponſagio, et omni wrecco, et de totâ venditione achato et rechato, per totam terram et poteſtatem noſtram, cum ſochâ et ſaccâ thol et them: et quòd habeant infangthef; et quòd ſint wrecfry, witefry, et laſtagefry; et quòd habeant domum et ſtrand apud Yernemuth, ſecundùm quod continetur in ordinatione per nos inde factâ et perpetuò obſervandâ; et quòd quieti ſint de ſhiris et hundris, ita quòd ſi quis verſus eos placitare voluerit ipſi non reſpondeant, neque placitent aliter quàm placitare ſolebant tempore Henrici proavi noſtri; et quòd habeant inventiones ſuas in mari et in terrâ; et quòd quieti ſint de omnibus rebus ſuis et de toto mercato ſuo, ſicut liberi homines; et quòd habeant honores ſuos in curiâ noſtrâ, et libertates ſuas per totam terram noſtram quocunque venerint; et quòd ipſi de omnibus terris ſuis, quas tempore Hen. regis patris noſtri, viz. anno regni ſui 44°. poſſiderunt, quieti ſint in perpetuum de communibus ſummonitionibus coram juſticiariis noſtris ad quæcunque placita itinerantibus, in quibuſcunque comitatibus terræ ſuæ exiſtent, ita quòd ipſi non teneantur venire coram juſticiariis prædictis, niſi aliquis baronum ipſorum aliquem implacitet vel ab aliquo implacitetur; et quòd non implacitent alibi, niſi ubi debuerunt et ubi ſolebant, ſcilicet apud Shipweyam: with a confirmation of other ancient liberties, &c. *Ita tamen quòd ſi ipſi barones in juſtitiâ faciendâ ſeu recipiendâ defuerint, cuſtos noſter et hæredum noſtrorum quinque portuum, qui pro tempore*

tempore fuerit, portus et libertates eorundem ingrediatur ad plenam justitiam faciendam; ita quòd dicti barones et hæredes sui facient nobis et hæredibus nostris regibus Angliæ per annum plenarium servicium suum 57 navium ad custum suum per 15 dies ad nostram vel hæredum nostrorum summonitionem. Concessimus etiam eisdem, quod habeant infangthef in terris suis infrà portus prædictos eodem modo, quo archiepiscopi episcopi abbates comites et barones habeant in terris suis in Com. Kanc. et quòd non ponantur in assisis et juratis vel recognitionibus ratione forinsecæ tenuræ suæ contra voluntatem suam; et quòd de propriis vinis suis de quibus negotiantur, quieti sint de rectâ prisâ nostrâ, viz. de uno dolio vini ante malum, de alio post malum. Concessimus etiam, quòd nos, vel hæredes nostri, non habeamus custodias vel maritagia hæredum suorum, ratione terrarum, quas habent infrà libertates et portus prædictos, de quibus facient servicium suum antedictum, et de quibus nos vel antecessores nostri custodias et maritagia non habuimus temporibus retroactis. Prædictam autem confirmationem et concessionem fieri fecimus, salvâ semper in omnibus regiâ dignitate, et salvis nobis et hæredibus nostris placitis coronæ nostræ vitæ et membrorum.

The other charter was made by the same king E. 1. viz. 28 April 26. E. 1. whereby he grants to the barons of the five ports for their service,

*Quòd ipsi, et eorum hæredes barones eorundem portuum, de cætero sint quieti de omnibus tallagiis et auxiliis nobis et hæredibus nostris, de corporibus propriarum navium suarum et earum attilio * præstandis; et quòd de legalibus rebus et mercimoniis, quas ipsi intrà terram nostram Hiberniæ debito modo emere contigerit, nullus rebus et mercimoniis illis sit eorum particeps, nec cum illis contrà voluntatem suam inde particeps quoquo modo; et quòd omnes illi infra dictos 5 portus oriundi, licèt ipsi terras vel tenementa extrà libertatem eorundem portuum tenuerint per tale servicium per quod maritagia eorum ratione minoris ætatis ipsorum ad nos vel hæredes nostros pertinere deberent, se maritare possint sine occasione nostrâ hæredum vel successorum nostrorum, salvo jure alterius cujuscunque.* And then follows the charter of 28 April, 26. E. 1. touching the contributions of all *ad navigium juxta facultates*, whereof before.

These be the principal liberties of the five ports. It is true, they had other liberties, which they claim by prescription. Some have been allowed, some disallowed; as, namely, a liberty that they claimed in nature of repriſal or without, viz. that if any of their members were injured, or unjustly imprisoned in London, they claimed by custom to attach and imprison any freeman of London found within their ports, till right were done to their co-

* *Attilio* is in the manuscript. But Mr. Jeake, after observing, that the word is in Mr. Thynn's manuscript of this charter, substitutes *articulo* for it. Jeak. Cinque Ports, 39.—EDITOR.

baron.

baron. This upon ſolemn argument, 41, 42. El. C. B. was adjudged a void cuſtom.

The charters mention ſome differences between the barons of the five ports and thoſe of Great Yarmouth, which was principally touching certain privileges claimed by them of the five ports in the faire and herring-fiſhing at Yarmouth. Theſe differences received ſeveral deciſions by the king and his council, too long here to be inſerted. One is mentioned in the charter of 6. E. 1. which was 20 May 5. E. 1. another the laſt of March 33. E. 1. *Vide Pat.* 6. *E.* 3. *m.* 19. *Pat.* 5. *E.* 3. *p.* 1. *m.* 1.

Touching the juriſdiction of the five ports, it is to be known, that each of the ports had their own particular court for matters reſpectively ariſing within the ports.

But beſides that, they had a common court at Shipway, wherein there ſat as judges the warden of the cinque ports and the mayors and bailiffs of each of their ſeveral ports, at which court there was a grand inqueſt returned, viz. two, three, or four, out of each of the cinque ports. And here they met as one common body; judgments were given by the common conſent of the warden, mayors, and bailiffs, but pronounced by the warden; and to this court belonged cognizance of treaſon againſt the king, and of falſe judgments given in any one of the cinque ports, and of ſubtraction of the ſervice of the ſhips belonging to the ports. So that hereby and by the charter above recited it ſhould ſeem, erroneous judgments, given by the particular ports, ſhould be reverſed before the warden of the cinque ports as above. Yet our books tell us, it was to be reverſed before the conſtable of the caſtle of Dover, 30. H. 6. 6. But it is not as conſtable of Dover caſtle, but as warden of the cinque ports; for both theſe offices are ordinarily in one perſon.

Touching their clauſe of exemption from being put in jurats, by reaſon of their foreign tenures; there was a charter afterwards, 12 Feb. 18. E. 1. which was ſomewhat fuller than the former. But in parliament E. 1. there grew a queſtion touching the interpretation of theſe charters; and it was reſolved in parliament,

1. That for their foreign lands which they had purchaſed, or ſhould after purchaſe, they were to perform their ſervices in juries, as other freeholders.

2. For the foreign lands they had at the time of the charter granted, they were exempt from juries.

3. But

3. But for theſe foreign lands, if they left the ports and reſided upon their foreign tenures, and attended not their ſervice in the ports, they were to ſerve in juries.

4. But it ſeems by the judgment, that even for their foreign tenures which they purchaſed after, their perſonal attendance upon juries ſhould be excuſed, ſo long as they were actually employed in ſervice within the ports. *Vide Rot. Parl.* 50. *E.* 3. *n.* 17. *Quære tamen de hoc.*

In the charter there are two ſpecial exceptions, viz. *ſalvâ dignitate regiâ, et ſalvis placitis coronæ*; touching which, and ſome other things relating to the juriſdiction and exemption of the cinque ports, there are theſe things obſervable:

1. The liberty of the five ports doth not hold againſt the king's immediate intereſt; neither would it have ſo done, though this *ſalvâ* had been omitted; for the king's general grant is not preſumed to exclude himſelf, without ſpecial words. *V. P.* 9. *E.* 1. *B. R. rot.*

2. That although an appeal lyes in the cinque ports for ſome felonies, yet, if the defendant be at large in the county of Kent or elſewhere, or in the cuſtody of the marſhall, an appeal may be brought in the king's bench for a murder or other felony done in the five ports, and the writ ſhall be directed to the ſheriff of Kent; and when iſſue is joined, upon a ſurmiſe that the place is within the five ports, *ubi breve domini regis non currit*, and that ſuch a place is the next viſne, it ſhall be tried at that viſne next adjacent; and the ſheriff of Kent ſhall return the jury, and not the guardian of the five ports; for although the five ports be an exempt juriſdiction, yet they are part of the county. *V. M.* 44. 45. *El. B. R. Yelvert. Rep. n.* 8. *et Crook, n.* 22. *Criſpe et Verrol, T.* 43. *El. Brayne's Caſe.*

3. In inditements for felony or other matters before the mayor and jurats of the five ports, a *certiorari* lyes to remove them into the king's bench; for thoſe pleas are before them as juſtices of peace: but otherwiſe it is of civil ſuits, which are in their courts; and the writ ſhall not be directed to the warden of the five ports, but to the mayor, &c. of that port where the inditement depends. Only, if it be ſuch a crime wherein they have juriſdiction, the court may and do remand it; but if it be of ſuch a felony as is not within their juriſdiction, viz. a ſelony made ſuch after the grant of their franchiſe, as buggery, &c. there it ſhall not be remanded. *P.* 8. *Car. B. Regis. Crook n.* 3. *& T.* 8. *Car. ibidem n.* 13. *Tindal's Caſe.*

7. If in a civil ſuit, in the courts at Weſtminſter, iſſue be joined upon a matter alledged within the five ports, it

ſhall

ſhall be tried by the viſne next adjoining, by a *venire facias* directed to the ſheriff of Kent or Suſſex, where the port is, 32. H. 6. 26. But if a man hath a judgment in the king's court, againſt one that hath lands in the five ports, the record ſhall be removed into the chancery by *certiorari*, and thence ſent by *mittimus* to the conſtable of Dover caſtle, to make execution. M. 3. et 4. P. & M. Bendl.

5. And it ſhould ſeem, that although mention be often made of the conſtable of Dover caſtle, as the immediate party to whom thoſe concerns of the five ports belong, it in truth concerns him not ſo much as he is conſtable, but as he is guardian of the five ports, though commonly the ſame man be both.

6. That notwithſtanding the exemption of the cinque ports, yet they are liable to make execution of the king's mandatory writts; eſpecially in matters relating to the liberty of the ſubject, or in matters of ſtate. *Vide* mandate to deliver a party cauſeleſly impriſoned there, *Clauſ.* 21. *E.* 1. *m.* 5. *Vide inter placita parliamenti* 33. *E.* 1. *libro parl.* where Michaelis de Seagrave was impriſoned by the warden of the five ports, by the king's precept, within the precincts of Dover, and after reſcued by the barons of Dover, upon pretence of an arreſt contrary to their liberties; and they were fined to find a ſhip four months for this contempt.

PARS TERTIA.

Concerning the cuſtoms of goods imported and exported.

CAP. I.

The order and method of the whole enſuing diſcourſe.

HAVING in the former Part, as preparatory to this, gone through the examination or hiſtory of the ports, I now deſcend to the hiſtory or narrative of the king's cuſtoms, in which I ſhall proceed in the order enſuing.

The cuſtoms, that have belonged to the crown of England as part of the revenue thereof, are of two kinds, viz. the inland cuſtoms, or the maritime cuſtoms.

The inland cuſtoms, as I may call them, are thoſe prerogative revenues, that ariſe within the land for the maintenance of the royal ſtate; of which ſome are ancient and fixed in the crown; as goods of felons, fugitives and outlawed perſons, waifes, ſtrays, tolls of ſeveral ſorts, &c.: ſome caſual or occaſional; as hideage, cranage, eſcuage, tallage of his demeſnes, tenths of boroughs, fifteenths, ſubſidies, &c.

The maritime cuſtoms were of two kinds, viz. ſuch as were fixed and hereditary, or ſuch as were caſual and temporary.

The fixed or hereditary ſeem to be of theſe kinds, viz.

1. Such as are ſettled in the crown by the common law. Such is that of priſage.

2. Such as are ſettled in the crown by ſpecial cuſtom. Such are thoſe cuſtoms of ports, that by preſcription or uſage are due to the king, or other lords of ports by derivation from him, expreſly by charter, or implied by preſcription.

3. Such as are ſettled in the crown originally by act of parliament; as the great cuſtoms of wools, woolfells, and leather.

4. Such as in their original were only by impoſitions, but by long uſage have obtained the reputation of a right; as the cuſtom of cloth.

5. Such, as are ſettled by compoſition or contract, were thoſe that were ſettled in the crown by *carta mercatoria* by merchants aliens.

Of theſe I ſhall diſcourſe under the ſeveral periods of the times wherein they began and took place, and ſhall ſhew their original growth and interruption, according to the ſeveral ſeries of the times relating to them.

The caſual or temporary duties were ſuch as had no certain or fixed continuance; and they were of two kinds, viz.

1. Such as were granted by parliament, ſometimes for years, ſometimes for life; ſometimes in one proportion, ſometimes in another; as the various ſubſidies of tonnage and poundage.

2. Such as had the inception by impoſition by the king's grant of patent, either in the intermiſſion of theſe ſubſidies, or by way of acceſſion to or augmentation of them; as upon wines principally, began by queen Mary, and variouſly continued by intermediate viciſſitudes until this time.

Theſe alſo I ſhall take up in order, and in ſeries of time, as they arrive, with the ſeveral laws occaſionally made with relation to theſe duties, as they occur in order of time.

And becauſe priſage of wines ſeems to be an ancient ſubſtantive duty taken by the crown in all times, I ſhall begin my diſcourſe with that duty. Then I ſhall deſcend to thoſe cuſtomable duties ariſing by uſage in ſeveral ports. And then I ſhall take up the conſideration of thoſe other cuſtoms, both certain and temporary, according to the order and ſeries of their ſeveral times, and the ſeveral kings reigns in which they began, or were augmented, diminiſhed, repealed, revived or altered. And when I have gone through theſe, I ſhall have finiſhed what I intended in this particular, viz. *è profundo antiquitatis antro vectigalium maritimorum origines ac progreſſus in Angliâ extraherè ac luci reddere.*

CAP. II.

Concerning priſage of wines; its nature, original, and progreſs.

PRISAGE of wines is an ancient inheritance of the crown of England; and is no part of that prerogative which is called purveyance, to take proviſions for the king's houſehold; but it is a fixed ſettled inheritance, though poſſibly in its original it might take its riſe from thence.

And

And therefore it was agreed, 40. 41. Eliz. in a *quo warranto* againſt Haughton, who had the priſage of London and the ports adjacent, and the office of Butler there, for years by the king's grant, that it was grantable for years or otherwiſe. In Ireland, it hath been received to the uſe of the crown by the family of the Butlers, now earls of Ormond, being the king's chief butlers of Ireland by tenure.

It is called in old ſtatutes and charters *recta priſa vinorum*, and ſometimes *certa priſa*, viz. two ton of wines in every ſhip laden with 20 tons, one before the maſt, one behind, paying 20s. *pro quolibet dolio*. *Vid. cartam* 18. *H.* 3. *civibus London. Conceſſimus inſuper eiſdem civibus, per totam terram et poteſtatem noſtram, ubi veniunt cum aliquibus mercandiſis, ac etiam per omnes portus maris tam citra mare quàm ultra, quòd quieti ſint de theolonio et laſtagio et omni aliâ conſuetudine, exceptâ antiquâ priſâ noſtrâ vini, viz. unius dolii ante malum et alterius retrò malum, viginti ſolidis pro dolio ſolvendis.*

This twenty ſhillings per ton is at this day turned into the payment of freight, as I take it.

In this ſection I ſhall declare,

I. Of what priſage is due.

II. Of what quantity and by what proportion it is due.

III. In what manner to be taken.

IV. When it becomes due.

V. What remedy for it.

VI. Who are diſcharged, and by what words.

VII. Who may have it in point of pernancy, and by what title.

I. For the firſt of theſe, it ſeems it is due of all ſorts of wines; although, *Rot. Parl.* 8. *E.* 2. *m.* 16. it ſeems there was a queſtion made, whether this prerogative extended to Reniſh wines, or only to Gaſcoign wines. But it ſeems that it extends to all ſorts of wines; and ſo it hath been ruled.

II. For the quantity of which it is to be taken, in the parliament roll 1. H. 4. n. 161. and 2. H. 4. n. 109. it is recited in a petition of the commons, that this duty commenced by grant in parliament (but it is not ſhewn when and where); and that by that grant it was proved, that of every ſhip laden with 30 tons of wine, the king ſhould have one ton before the maſt, another behind the maſt; and that it was ſo uſed until about the 17. R. 2. when John Waltham, biſhop of Saliſbury, treaſurer, *torcenuſment et ſans authority de parlement fiſt le botteler prendre in cheſcun port devert le South et Weſt, de cheſcun* 10 *tuns* 1 *tun, et de* 20 *tuns* 2 *tuns, pur le priſe, encounter les uſages*; and that judgment had been given in 16. 17. R. 2. in the exchequer

exchequer againſt ſome Weſtern merchants accordingly; and they pray remedy. All the anſwer that could be obtained to both theſe petitions was only, *ſoit uſe come ad eſte uſe devant ces heures.*

But certainly the conſtant practice and right hath been, for the king to have two tons for priſage of every ſhip laden with twenty; and accordingly it is declared in the bill that paſſed both houſes, 17. Car. I. for tonnage and poundage.

And as to the taking of one ton of every ſhip laden with ten, it hath been the conſtant practice of the farmer of the priſage to take it accordingly; and very many decrees in the court of exchequer are in affirmation of it. And accordingly in an old book manuſcript, intitled, *Conſuetudines et Uſus villæ Sandwici*, begun by Adam de Campney 29. E. 1. but continued to the latter end of E. 3. viz. fo. 3. *Item dominus rex habet ibi priſam ſuam, et cuſtodem priſæ ſuæ, qui capit priſam in hunc modum: de quâlibet nave carcatâ vinis, utrùm fuerit parva vel magna, dammodo gerat* 20 *dolia, et venerit vel de partibus Vaſconiæ vel de aliis portubus ubi vina creſcuntur, et velit ire ultra mare vel ad locum aliquem in Angliâ ubi cuſtos priſæ fortè non eſt conſtitutus, vel ſi debet diſcarcari in eâdem villâ, unum dolium, quod eligere voluerit ante malum, et aliud dolium poſt malum, ſolvendo pro illis duobus doliis* 40s. *ſcilicet* 20s. *pro utroque. Solet tamen ipſe cuſtos eligere duo dolia pro* 40s. *ut prædictum, vel unum dolium et nihilo, ſed aliud non eſt recta priſa. Si autem fuerint in dictâ nave* 19 *dolia vini, non capiatur de illis niſi unum dolium pro* 20s. *et ſi fuerint* 10 *dolia vini, capiatur unum dolium; ſi verò* 9 *dolia vini fuerint, nulla priſa capiatur. Et ab iſtâ priſâ ſunt omnes barones quinque portuum liberi.*

And in an ancient manuſcript book, that I have ſeen, touching the cuſtoms of London, written about the middle of king E. 3. there is this memorandum touching priſage. *La pris de vines al oeps le roy. Si* 9 *tonneaux de vin venent, ou meins, en un neife ou en un bat, le chamberlein le roy riens prendrâ à la priſe le roy per droit; ſi* 10 *tonneaux de vin venent, il doet prendre un tonnel; et ſi* 19 *tonneaux venent, il ne prendra forſque un tonnel; en* 20 *tonneaux le chamberlein prendra* 2 *tonnells; et ſi* 100 *tonneaux ou* 200 *enſemble en un neif venent, le chamberlein le roy ne doet prendre forſque* 2 *tonneaux; et ſi un grant neif, que vient ove vines, ſe voil diſcharger en batteaux avant que il veigne en havene, et la neife ſuive les batteaux ove les vines remanants deliver al havene, le chamberlyn ne doet prendre ne de la neife ne des batteaux fors un ſol priſe; et ſi de les mariners de la neif ou de les batteaux la priſe le roy eit eſtre priſe à Sandwic ou à aucun autre port de la mere per le chamberlein ou per autre bayly à ceo auturiſe per le roy, ne doet le chamberlein riens prendre à Londres, mes per tout le power le roy doivent les merchants, à que les vincs ſont, eſtre*

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quites per la primère priſe; et quant 9 tonneaux ou 19 tonneaux venent à London en bat. bien liſt al chamberlein de prendre le ſiance ou le ſerement de merchants, à qui les vines ſont, que eux ne ſont ne ſe font en tiel manner faire vener les vines per parcel pur toller ou pur eſchuer le priſe noſtre ſeigneur le roy.

But if leſs than 10 tons be laden in any ſhip, the king is not to take any priſage *pro ratâ*, but the merchant is to be diſcharged thereof.

Yet if the lading of the ſhip with a ſmaller proportion than ten were apparently frauduleſt to deceive the king of his priſage, there have been ſeveral decrees in the exchequer-chamber, for the relief of the king and his farmer againſt ſuch fraudulent lading, and for a proportionable allowance to the king or his farmer, though the lading of the ſhip were under ten ton *.

For inſtance: a merchant at the port of A. in France hath 20 ton of wine to ſend for England to the ſame port, viz. to the port of Hull or any other port; and there are ſeveral ſhips in the port of A. bound for the port of Hull; and the merchant may have ſtowage if he pleaſes for all his wines in one of theſe ſhips, but he will lade them all in three ſeveral ſhips bound for the ſame port, viz. eight in one ſhip, ſix in another, and ſix in another, all bound for the ſame port: in this caſe, though in ſtrictneſs of law no priſage be due, yet the king ſhall have his full priſage made good to him, by decree in the exchequer-chamber; for it is apparent fraud to deceive the king of his duty. And accordingly it was decreed in the caſe of ſir William Waller and a merchant of Hull †.

But if there be ſeveral proprietors of ſeveral wines under 10 ton a-piece, though in all amounting to 10 or 20 ton, and they lade them all in ſeveral ſhips under 10 ton in a ſhip to the ſame port; or if the ſame man be proprietor of ſeveral parcels of wine amounting to 20 ton, and for want of ſtowage in one ſhip lade them in ſeveral ſhips in ſmall parcels upon neceſſity, though all bound to the ſame port; here the wine ſhall not be charged by computation with priſage. But then it is incumbent upon the merchant to make it appear, that he was conſtrained by neceſſity to a diviſion of them; becauſe otherwiſe, coming from the ſame port to the ſame port, at the ſame vintage, or at or very near the ſame time, it carries a preſumption of fraud *primâ facie*. But if they be the wines of the ſame proprietor, and come from ſeveral ports, or to ſeveral ports, or from the ſame port to the ſame port

* See acc. the Attorney-General v. Shirt, Hardr. 56. and the precedents there cited; and alſo the Attorney-General v. Horſham, ibid 477.—EDITOR.

† This ſame caſe is reported in Hardr. 218.—EDITOR.

at

at ſeveral conſiderable diſtances of time, then no ſuch fraud is preſumed; and therefore he ſhall not pay priſage for all his wines by way of computation of all the quantities together.

If a man lade aboard a ſhip about 9 ton and under 10 ton, yet by the help of the court of equity the king ſhall have one ton for priſage, though it be under ten; becauſe by the conſtant practice of the exchequer it hath been held a covenous lading; and ſo frequently decreed: but in that caſe the king cannot ſeize, but muſt relieve himſelf in the court of exchequer-chamber.

III. In what manner to be paid or received.

(1.) Although the uſual expreſſion of priſage when a ſhip is laden with 20 ton is, that one ton ſhall be taken for priſage before the maſt, another behind the maſt; yet the king or his butler is not bound to take them in that order, but may take them both behind or before the maſt: for otherwiſe the merchant might deceive the king by covenous placing of his wines; and this is but the circumſtance; for if there be but ten tons aboard, the king ſhall have one for his priſage: and that was accordingly reſolved upon demurrer H. 8. Jac. B. R. Kenicot et Bogan, reported by juſtice Yelverton.

(2.) The king is to pay for every ton taken by way of priſage 20s. which, as it ſeems, is for freight.

(3.) The wines taken by the king or his farmer for priſage ought to be diſcharged of cuſtom and ſubſidy; for priſage is a kind of cuſtom itſelf, and it is no reaſon that cuſtom ſhould be paid for cuſtom. If it ſhould be paid by the merchant, he ſhould be charged for cuſtom for what belongs not to him but to the king; and it is impoſſible, or at leaſt improper, for the king or his farmer to pay it to himſelf.

(4.) If ten ſeveral merchants lade in one ſhip each of them a ton of a ſeveral kind of wine, the king may ſeize which ton he pleaſe, though it may be double the value to any of the reſt; and the merchant, whoſe wine is ſeized, ſhall have average, or a rateable contribution, from the other merchant whoſe wines are ſpared, by decree in the court of exchequer-chamber.

IV. As to the time when it becomes due.

(1.) It is not due by the lading of the wines aboard in France or Spain, or other foreign countries.

(2.) It is not due by the coming into the narrow ſeas, or the king's dominions.

(3.) It

(3.) It hath been doubted, whether the duty be not due by the importation into the port.

P. 9. *Jac. B. R.* Waller and Hanger, reported by divers reporters *. The citizens of London are by charter free from priſage. A citizen having wines at ſea and others in the port dies before bulk broken.

1. It was held firſt, that for the wines abroad at ſea the executor ſhould be chargeable, becauſe the duty is not due while they are *vina civis*; though others thought, that the executor by right of repreſentation ſhould be diſcharged of the priſage even of thoſe, when afterwards unladen.

2. As to the wines in the port, the court was divided. Two juſtices held, that the duty was not due till bulk broken, though the goods were in the port; and conſequently, the executors not being citizens at the time when the duty became due, they could not partake of the privilege granted to citizens.—The other two held, they ſhould be diſcharged by virtue of the privilege granted to the citizens. Firſt, becauſe they ſuppoſed the duty due by the bringing of the wines into the port by way of merchandize, or at leaſt ſo far fixed that they might be ſaid *bona civium* at leaſt when the duty was fixed, though perchance the unlading might be a circumſtance requiſite to the aſcertaining and compleating of the duty. Secondly, becauſe the executor ſtanding *in loco teſtatoris* is poſſeſſed in right of the teſtator; and ſo though the duty ſhouuld not be compleated before bulk broken, yet at that time they were *bona civis*.

And though the court of king's-bench were divided in opinion, yet before that, *M.* 6. *Jac. in Scaccario*, it was ruled, that the executor ſhould be diſcharged of priſage; but principally upon the laſt reaſon, becauſe the executor hath the wines in right of him that was a citizen; but not upon the point of the compleating of the duty by the importation into the port.

(4.) When bulk is broken, then, and not till then, priſage is due; for till then the merchant hath not ſufficiently aſcertained whether he means to trade in that port, and it may be he may go to ſome other harbour: but when bulk is broken, that is, when the goods or part of them are unladen to be laid on land, then there is a plain evidence appearing that he means to fix on this as his port. And accordingly the law hath been always held; that

* This caſe is very fully reported in 3. Buſſtr. 1. 1. Ro. Rep. 138. and Cathr. Rep. 1. It is alſo reported, but not ſo much at large, in Mo. 832. It is cited and ſhortly ſtated in 1. Sid. 130. and Hardr. 302.—EDITOR.

if the merchant unlade any part of his wines, though he unlade not all, yet priſage ſhall be paid for the whole lading of that ſhip.

Clauſ. 40. *E.* 3. *m.* 22. *pro Stephano Ward.* The caſe upon the record appears to be thus: The prince as earl of Cheſter had priſage of wines unladen within any port in Cheſter. Stephen Ward, merchant, brought ſome wines from Bourdeaux to Liverpoole in Lancaſhire, *et certa dolia vinorum eorundem ibidem diſcarcaſſet, ac Ricardus de C. pincerna noſter priſas noſtras de omnibus vinis in eâdem navi exiſtentibus ad opus noſtrum recepiſſet.* The merchant went to Poole in Cheſhire with the reſidue of his wines, and the prince's officers demand priſage of thoſe wines that were brought thither; but were prohibited by the king's writ, becauſe the priſage was formerly paid to the king for the whole ſhip's lading, though only part were unladen.

And that is the meaning of that writ, 1ma *Pars Pat.* 28. *E.* 3. *m.* 21. *Rex omnibus ſalutem. Quia de ſolutione priſæ noſtræ vinorum in regno noſtro Angliæ, &c. quoties et ubi fieri debent, multis vertitur in dubium; nos, ad tollendum hujuſmodi dubium, vobis, et omnibus quorum intereſt, innoteſcimus per præſentes, quòd ubicunque infrà regnum noſtrum Angliæ navis aliqua vinis carcata applicuerit, et priſa noſtra de vinis illis ſemel ibidem ritè ſoluta fuerit, et de ſolutione priſæ prædictæ per litteras pincernæ noſtri vel alio modo legitimo conſtare poterit, ſi navis illa cum vinis illis alibi in eodem regno poſtea applicuerit, priſa noſtra prædicta de vinis prædictis capi non debet. Clauſ.* 31. *E.* 3. *m.* 11. *pro mercatoribus Hiberniæ.*

For where the bulk was firſt broken, the priſage was taken of the whole lading.

And with this agrees the reſolution of the caſe of Kennicott and Bogan, *H.* 8. *Jac. B. R.* before cited. In trover and converſion for a ton of wine, the defendant pleads, that the king is ſeiſed in right of his crown of the priſage of wines, viz. out of every ſhip importing into any port from any parts beyond the ſea ten ton of wine, one ton; and out of every ſhip importing 20 ton into any port *et ibidem exonerat.* two ton, the one before the maſt, the other behind the maſt: and then ſhews the grant of the office of chief butler to ſir Thomas Waller to take priſage, &c. and that there were imported from Bourdeaux into the port of Exeter in a ſhip 20 ton of wine, and that nine of them were unladen, and that two ton were due to the king for priſage, and that the defendant took them and converted them, &c. Upon demurrer theſe points were reſolved:

1. If

1. If a merchant import 20 ton of wine, though he unlade but part, yet he ſhall pay priſage for the whole; for if the bulk be once broken, it ſufficeth to the king for all the priſage.

2. Although his plea be ſpecial for all unladen, yet it is good enough to entitle the king if part be unladen.

3. That though his plea be ſpecial, viz. for one before the maſt, another behind, and the averment be general, yet the plea is good; for the king may take his priſage in any part of the ſhip.

And although by the ſtatutes of 28. E. 3. cap. 15. 20. R. 2. cap. 4. and the firſt rule in the book of rates, if a merchant breaks bulk and unlade part of his goods, he ſhall not pay ſubſidy or cuſtom for the reſidue; yet theſe laws extend only to cuſtoms and ſubſidies, and priſage comes not under the name of cuſtoms in thoſe acts; and therefore if bulk be broken in part, he ſhall pay his priſage for the whole lading. And thus it hath been accordingly uſed, though it ſeems it ought to be intended of breaking bulk of part of the wines, not of the other commodities of the ſhip's lading.

But in ſome caſes the breaking of bulk, or unlading of part of the wines, doth not entitle the king to priſage for the reſt, viz. in theſe caſes:

1. In caſe of neceſſity. As if the mariners unlade part by reaſon of a tempeſt or leak of the ſhip; this is no breaking of bulk to entitle the king at leaſt to his full priſage of the reſidue, becauſe not done to the intent to trade, but for neceſſity.

2. In caſe of a cuſtom or uſage.—*Trin.* 33. *E.* 1. *B. R. rot.* 85. *Hibernia*, the cuſtom of payment of priſage in Dublin. The uſe there is, if a great ſhip laden with wine come for the port of Dublin, becauſe the haven is not able to bear a great veſſel with his full lading, they uſe to unlade part at Dalkey, and ſend it in by lighters into the port of Dublin, and no priſage is paid for this till the ſhip is come with the reſt of his lading; and then the king's officer takes his full priſage of the wines brought in by the lighters, or of the reſt of the ſhip's lading, at his election, but no ſale to be made by the merchant till the priſage paid.

And thus much ſhall ſerve touching the time when the duty grows due.

V. Touching the remedy for priſage, the proper remedy is ſeizure by the king's officer; and thereby the property is changed. But if the officer be hindered from ſeizure, or if the king's duty be ſtolen and not paid, it doth not induce any forfeiture of any of the other goods that come, as it doth in caſes of cuſtoms, as ſhall be ſhewn in due time. But the king

king or his farmer may have an action of trover and converſion; or an information lyes againſt the merchant to recover the value, and againſt thoſe that hinder the king's officer in ſeizing the priſage, whereupon the party convicted ſhall be fined and impriſoned. And this is frequent at this day, and very ancient. *Vide Hill.* 7. *E.* 1. *rot.* 14. the caſe of the abbot of Melſa, againſt whom an information was exhibited in the king's-bench for hindering the king's officer to take *rectam priſam vini domino regi ſpectantem, viz. de uno dolio vini ante malum et alio poſt malum. Vide Hill.* 13. *E.* 1. *B. R. rot.* 2 *Briſtol.* But for cuſtoming wines in the names of thoſe that are free from priſage, a puniſhment is ordained per ſtatute 1. H. 8. c. 5.

And thus much alſo for the remedy. Only I ſhall add this, that in caſe of covenous or fraudulent parcelling of wine, or lading of above 9 ton and under 10 ton, whereof before, the uſual remedy hath been by Engliſh bill in the exchequer-chamber, being a court of revenue; where, if the fraud appears, the value of the wines juſtly due for priſage hath been commonly decreed to the king or his farmer againſt the merchant importer.

Touching the diſcharge of priſage, and the liberty of priſage tranſlated to a ſubject, which are the points remaining for the abſolving of the enquiry touching priſage, it ſhall be declared in the next chapter.

CAP. III.

Touching exemption from priſage, and the tranſlation of the duty itſelf to a ſubject.

THE duty of priſage is a prerogative of revenue belonging to the crown, as hath been ſaid in the former chapter. But yet it is not ſo inſeparable from the crown, nor ſo perſonal to the king, but that it may be diſcharged or transferred. In this chapter therefore I will ſet down theſe two things, viz.

I. How it may be diſcharged.

II. How transferred.

I. Touching the diſcharge of priſage I will ſet down theſe things:

(1.) The manner how it may be done; and

(2.) Who are thoſe that have the diſcharge of priſage, and how far that diſcharge extends.

(1.) Touching

(1.) Touching the former of theſe, how this diſcharge may be had, I ſhall ſet down the learning thereof in theſe enſuing propoſitions.

1. A man cannot have a diſcharge of this duty ſimply by preſcription; becauſe it is an inheritance due of common right to the crown. And ſo it was accordingly ruled *M.* 6. *Jac. in Scaccario*, in the caſe of the town of Fowey in Cornwall.

2. Though a man cannot have a diſcharge thereof by a ſimple preſcription, yet he may in ſome caſes have it by preſcription by reaſon of another thing. As he that hath a county-palatine by preſcription, may have a diſcharge of priſage by preſcription; for he may by preſcription have priſage in point of pernancy, as ſhall be ſhewn.

3. A man, or town, or corporation, may have a diſcharge of priſage by charter; and this is without all queſtion, as ſhall be ſhewn. If the king grant to the mayor and commonalty of the city of London, *quòd omnes cives civitatis prædictæ* ſhall be free of priſage, though the charter be granted to the corporation, yet the exemption is well transferred thereby to particular perſons; and ſo in caſe of a diſcharge of toll, of putting into juries, and the like privileges of diſcharge.

But, 4. Although the king may grant an exemption from priſage, yet it ought to be by ſpecial words mentioning priſage; for general words of all cuſtoms, or words relative to the liberties of others that have that exemption by ſpecial charter, will not ſerve.—*Vide* the caſe of the Venetian merchant cited by Tanfield, Davis Rep. 17. to have been adjudged in the exchequer. The king grants to a Venetian merchant, that he ſhould be quit *de omnibus cuſtumis ſubſidiis et impoſitionibus et omnibus aliis denariorum ſummis debitis et ſolubilibus pro quibuſcunque mercandizis importandis*; and that he ſhall be as free as the citizens of London: and by colour of this he claimed to be free of priſage; becauſe by ſpecial charter the citizens of London are free of priſage. Yet it was adjudged, that this did not diſcharge him of priſage; becauſe priſage is not ſpecially expreſſed in the ſame grant.—Perchance the caſe might be of butlerage; becauſe merchant-ſtrangers have an exemption from priſage. But be it one or the other, it will be alike in both; for neither butlerage nor priſage will be diſcharged without ſpecial words.

(2.) As touching the ſecond matter, viz. who have ſuch diſcharge of priſage, and how far their diſcharge extends. It is true, there was once an attempt, that all the king's ſubjects might have been diſcharged of priſage, paying for every ton of wine priſeable 20d. and for every pipe 6d. at the ports of diſcharge, as aliens paid. *Rot. Par.* 16. *R.* 2. *n.* 29. And it came

came near to a bargain; for the king's anſwer was, *s'ils voillent payer deux ſouldz per cheſcun tonnel de vine permy le realme, ſi bien deins franchiſes come de hors, le roy voet qu'ils ſoient quitts de ſa priſe, et ſi non ſoit uſe come devant.* But neither after took effect; and ſo it ſtands as it did before.

There were three great bodies that had an exemption from priſage.

1. Merchant-ſtrangers who by the *carta mercatoria* of 31. E. 1. which we ſhall ſee hereafter mentioned at large, were diſcharged of priſage, and by contract were to pay *nomine cuſtumæ* 2s. *de quolibet dolio vini quod adducent vel adduci facient intra regnum*, which 2s. per ton is commonly called butlerage.

2. The charter of exemption granted to them of the cinque ports, 1. E. 3. viz. to be quit of toll *per totam terram et poteſtatem noſtram; et quòd non ponantur in aſſiſis ratione forinſecæ tenuræ contra voluntatem ſuam; et quòd de propriis vinis ſuis de quibus negotiantur quieti ſint de rectâ priſâ noſtrâ, viz. de uno dolio vini ante malum, de alio poſt malum.* It is true, that the cinque ports claimed, an exemption of priſage long before by preſcription, but it was never fixed till this charter, viz. *Clauſ.* 1. *E.* 1. *m.* 5. Touching this exemption, it is to be obſerved:

1. That this exemption from priſage, did not extend to butlerage, neither doth at this day: and therefore, *Communia P.* 7. *E.* 3. *in Scaccario, inter Rodman de Poole pincernam regis et Petrum Garcy, et alios comburgenſes de Sandvico*, it is reſolved, that where a merchant alien was made a freeman of one of the cinque ports, yet he ought to pay butlerage; for the alien was diſcharged of priſage by a contract paying 2s. per ton; and the exemption granted to the cinque ports expreſly from priſage, would not be conſtrued to extend to butlerage, which was another thing, though ariſing in reſpect and compenſation of priſage.

2. That this exemption extended, and extends at this day only, to thoſe wines that are brought into the cinque ports: and therefore, if a merchant of one of the cinque ports import wines into his own port, or any other of the cinque ports, he ſhall be diſcharged of priſage, by virtue of the charter; for as they claim and have their liberty by one common charter, ſo they are to this purpoſe but one common port; and ſo the freeman of one of the cinque ports ſhall have the exemption in another of the cinque ports. But if a freeman of the cinque ports import wines by way of merchandize into the port of London, or into any other out-port, not parcel of the cinque ports, he ſhall pay priſage; for the privilege was given in reſpect of the place principally, and not of the perſon. And accordingly it was ruled upon great debate in *Camerar. Scaccarii, T.* 7. *Jac. in Swinerton and Thornbull.*

3. It

3. It doth extend only to ſuch as are truly members of the cinque ports, and pay ſcot and lot there; and therefore anciently thoſe of the cinque ports were fined, if they did colourably admit any perſon to be a freeman of their ports, that was in truth no inhabitant, merely to gain the privilege, viz. *ſi advocare voluerint aliquem de libertate ſuâ eſſe qui non eſt.*

3. The third charter of exemption is that which was granted to the city of London in the ſame year, viz. 1. Ed. 3. which runs thus: *Pro meliorâtione civitatis noſtræ London, &c. conceſſimus, Quòd iidem cives noſtri de axiliis et contributionibus, &c. ſicut homines burgorum, et quòd contribuant cum communitate regni noſtri ſicut homines comitatuum* * *; et quòd de omnibus aliis tallagiis ſint quieti; et quòd nullus captor faciet aliquam priſam in civitate prædictâ vel extrà de bonis civium, niſi ſtatìm debitam faciunt ſolutionem; et quòd de vinis civium nulla priſa fiat per aliquem miniſtrorum noſtrorum, vel hæredum noſtrorum, ſeu alterius, contrà eorum voluntatem, viz. de uno dolio ante malum, de alio dolio retrò malum, ſeu aliquo alio modo, ſed inde perpetuò ſint quieti. Prohibuimus etiam, quòd nullus officiarius, ſeu proviſor noſtri, hæredum vel ſucceſſorum noſtrorum, mercandizet infrà civitatem vel extrà.*

Upon this charter the ſame concluſions are to be made as upon the former of the cinque ports, viz.

1. That if an alien become a freeman of London, yet he is chargeable with butlerage, notwithſtanding this exemption.

2. That a freeman of London ſhall not, by virtue of this charter, be diſcharged of the priſage of wines imported in Briſtol, or any other out-ports; but his diſcharge extends only to wines imported into the port of London, whereof he is a citizen. It is true, that *Rot. Parl.* 11. *H.* 4. *n.* 73. Chaucer, being then the king's butler, exhibited a petition in parliament for the declaring of this exemption to extend only to citizens *reſient et demurrant deins le citty*; which was accordingly declared. But in that petition he recites, that they of the cinque ports and London ere *enfranchiſes en ycelle bien et franchment aller avec lour vines là, ou lour plerra, permy le realme d'Angleterre, ſans aſcun priſe à noſtre ſignior le roy ent paier.*

But as in the caſe of the cinque ports before mentioned, it was ruled, that the exemption of the cinque ports did not ex-

* The preceding paſſage is exactly agreeable to the manuſcript. But I think, that the manuſcript is erroneous. In the publiſhed charters of London, the tranſlation of the paſſage here intended to be given is, that the citizens, "ſhall be taxed "and contributory with the commonalty of our realm as common perſons, and *not* "as men of the city; which word *not* I take to be neceſſary to the ſenſe of the charter, though not conformable to the tranſcript of Lord Hale's manuſcript.—EDITOR.

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tend to wines imported into other ports; ſo in *Michaelmas* 4 *Car.* 1. in the exchequer-chamber, between Sir William Waller and ——, a caſe was made upon an Engliſh bill there preferred, wherein the queſtion was, whether the exemption of the citizens of London, by the charter of the 1. E. 3. or otherwiſe, did extend to wines imported by them in Briſtol or other the out-ports; and after ſeveral arguments, it was *unâ voce* reſolved by the barons as followeth, viz.

1. That the king, by ſpecial words, might exempt the citizens of London from priſage in the out-ports; viz. if the words had been *quòd de vinis civium nulla priſa fiat infrà civitatem vel extrà*, as ſome other exemptions in the ſame charter are penned, viz. that of exemption from purveyance without preſent payment.

2. But that this exemption from priſage doth only extend to their wines imported into London, and not into the out-ports. Firſt, becauſe the charter is granted *in tuitû civitatis*, not *perſonæ*; for it is *pro melioratione civitatis*: but if this privilege ſhould extend to the goods of citizens imported in the out-ports, it would carry the trade of wines from the city. Secondly, becauſe in the clauſe precedent touching purveyance, and ſubſequent touching purveyors, the words are expreſs, *tam infrà civitatem quàm extrà*; which words, omitted here in this clauſe, evidence that it ſhould not be extendible *extrà civitatem*. Thirdly, becauſe priſage is an ancient revenue of the crown, and the charters of exemption thereof ſhall be conſtrued ſtrictly, and ſo it hath been in all ages; and therefore it was decreed for the king and his farmer, anſwerable to the caſe of the exemption of the cinque ports before recited.

3. That *bona civium* muſt not be intended of every freeman of London. But firſt, he muſt be a freeman of London. Secondly, he muſt be a freeman and inhabitant of London; for though he be a freeman, yet if he inhabit out of London, he ſhall not be exempted from priſage eve for the wines imported into London. And accordingly it is declared by that judgment of parliament, *Rot. Parl.* 11. *H.* 4. *n.* 73. *Eſt declare per le roy per aviſe des ſeigniors in parlement, que nulle n'eit ne enjoy ſe tiel franchiſe en ceſt caſe, que ne ſoit citizen reſiant et demurrant deins meſme la citty, et que touts aultres demurrants en autres cittyes burghes ou villes eint et enjoyſent lour franchis eux graunt, ſavant tout dit à noſtre ſeignior le roy ſon inheritance in ceſt caſe*; and accordingly it was agreed in Hanger's caſe, 9 *Jac. B. R.* before cited. Thirdly, he muſt not only be a freeman and inhabitant, but he muſt alſo be a houſe-holder within the city. And therefore, *P.* 43. *Eliz.* in Snede and Sacheverall, a freeman of London, living in London as an inmate, ſhall not have his exemption; for ſuch a man contributes not to ſcot and lot, nor is beneficial

neficial to the city; and this privilege was granted *intuitû civitatis*, not *perſonæ*; and the grant being in diminution of the king's revenue, ſhall be conſtrued as ſtrictly as may be, and the word *civis* be taken in as reſtrained expoſition as it will bear.

And thus much concerning the buſineſs of diſcharge of priſage.

II. Touching the right of having priſage in pernancy.

(1.) It is clear, that, by an expreſs charter of the king, priſage may be claimed by a ſubject, as well in point of inheritance as for a term of years. And this hath been agreed in all thoſe caſes, wherein the king's farmer of priſage hath been plaintiff or defendant: but then as in caſe of a diſcharge, ſo much more in caſe of a grant, there muſt be expreſs mention of priſage. General words of *omnes conſuetudines*, or *cuſtumas*, or *priſas noſtras in tali villâ*, will not carry this royal franchiſe, 6. H. 3. 51. in the caſe of the archbiſhop of York. For the king had certain cuſtomary duties in ports, that were called *priſæ*, as *priſæ piſcium*, *priſæ boſci*, &c. but the priſage of wines is commonly expreſſed *priſam vini*, and moſt commonly *rectam priſam vini*.

(2.) Touching a title to priſage by preſcription, it ſeems it cannot be acquired barely by preſcription without a charter to bottom it. For as a diſcharge of priſage is not acquirable by preſcription, becauſe it excludes the king of a fixed ſettled prerogative; ſo much leſs can it be acquired by a bare preſcription in point of pernancy; for that doth not only deprive the king of it, but lodgeth it in another perſon. But,

1. Such a kind of priſage, as conſiſts with his majeſty's *recta priſa*, may be acquired by preſcription; becauſe it doth not exclude the king's duty, but ſuperinduceth another conſiſtent with it. Such, poſſibly, might that be which we find mentioned 6. E. 3. 51. *per Aldeb.** allowed to the archbiſhop of York; who, though he diſclaimed the king's priſage, claimed the firſt *taſt* and *acbate* under the name of priſage, which was allowed to him; for that was only a priſage in name, not that *recta priſa vinorum*, whereof we have hitherto treated.

The caſe of the archbiſhop of York touching the priſage of wines, appears to be thus.—The king grants to the predeceſſor of the archbiſhop of York, *priſas ſuas in aquâ de Hull*. In the eyre of 15 E. 1. the king brought a *quo warranto* againſt the archbiſhop of York, to ſet forth by what warrant he claimed *priſes de vine* in the port of the water of Hull. The archbiſhop came in perſon, and ſaid,

* *Aldeb.* was one of the ſpeakers in the caſe here cited; but *Schard* was the counſel who ſtated the archbiſhop's claim.—EDITOR.

that he claimed nothing in the priſe of wines *per noſme de priſe de vines eins le primer taſt et achate de vines.* And afterwards the 4. E. 3. in eyre upon a new *quo warranto* againſt the archbiſhop for the *primer taſt et achate de vines, il dit, qu'il claime le primer achate et taſt aprés le priſe de roy des vines; et dit, qu'il et touts ſes predeceſſors ont eſtre ſciſies de temps dont memory, &c.* After this the archbiſhop, upon the vein of his charters, did, notwithſtanding theſe diſclaimers, pretend title to the very priſage of wines, viz. one ton before the maſt and one ton behind. Upon a *quo warranto* againſt the archbiſhop for the priſage of wine, the archbiſhop made default; and thereupon the franchiſe ſeized. Upon a petition in parliament the archbiſhop was put into poſſeſſion, upon condition that he ſhould anſwer the king in a *quo warranto* for priſage. A *quo warranto* was thereupon brought againſt him in the commons-pleas, which we find begun *Hil.* 6. *E.* 3. *fol.* 11. The biſhop made his title to priſage by the before-mentioned charter of *priſas ſuas in aquâ de Hull*, and averred that he and his predeceſſors had enjoyed priſage of wines ever ſince. For the king thoſe judgments in eyre were alledged, and judgment demanded, inaſmuch as the king's charter had not in ſpecial words *priſas vini*, whether it paſſed. Judgment was given for the king, wherein theſe points were reſolved, viz.

1. The general grant of *priſas noſtras* will not of themſelves extend to paſs priſage of wines.

2. Though poſſibly a long uſage of enjoyment of priſage under ſuch an ancient charter, might have expounded it to extend to priſage, if there had been nothing elſe in the caſe; yet a charter within time of memory of *priſas noſtras*, when the archbiſhop himſelf of record had diſclaimed to have priſage by virtue of that grant, is a ſtronger evidence againſt the uſage, that it hath not that interpretation.

3. But it ſeems there admitted, that ſuch an ancient charter with an immemorial uſage concurrent had been a good title; but the plea being entered *ut ſuprà* judgment was given for the king, *M.* 6. *E.* 3. *fo.* 51. *Vid. Clauſ.* 7. *E.* 3. *pt.* 1. *m.* 14. a kind of ſequeſtration of butlerage and priſage in the port of Hull, between the king and the archbiſhop, till that plea determined.

But after this judgment the biſhop ſat ſtill and claimed not priſage; though, as to the franchiſe of the port and other liberties by him claimed in the water of Hull, he brought actions, afterward, *Michaelmas* 44. *E.* 3. *R. R. Rot.* 24. *Ebor.*

2. Though poſſibly preſcription alone is not ſufficient to intitle to priſage, yet it may by preſcription belonging to a county-palatine that is by preſcription.

Upon

Upon this title the earls of the county-palatine of Cheſter enjoyed priſage of wines in the port of Poole, being a port of that county-palatine. *Clauſ.* 40. *E.* 3. *m.* 22. *pro Stephano Ward.* The caſe is cited above upon another occaſion.

Upon this title alſo the biſhop of Durham claimed, and for aught appears enjoyed priſage of wines in his port, *Communia Trin.* 6. *E.* 3. *Northumbr. Memorandum, quòd cùm dominus rex de jure coronæ ſuæ habere debet rectam priſam ſuam de vinis applicantibus in regnum ſuum, viz. de quâlibet navе carcatâ viginti doliis vini et ampliùs unum dolium ante malum et aliud dolium retrò malum, eligenda ad opus regis per camerarium vinorum ſuorum, pro* 20s. *ſolvendis pro dolio illi qui vina illa adduxit: idemque dominus rex, et omnes progenitores ſui quondam reges Angliæ, priſam illam perceperunt et habuerunt à tempore quo non extat memoria, abſque eo quòd aliquis alius priſam illam in regno prædicto percipere debet ſeu conſuevit.* The king's butler, being oppoſed thereupon why he anſwered no priſage for the port of Hartlepoole, anſwered, that he was hindered by the biſhop of Durham. Thereupon the biſhop came in by proceſs, and claimed the priſage in that port to belong to him in right of his biſhoprick, *viz. quòd ipſe et omnes prædeceſſores ſui, à tempore quo non extat memoria, hujuſmodi priſas habuerunt ibidem prætextu libertatum eccleſiæ Dunelm. prædictæ*; and demands judgment whether he ſhall be put to anſwer without a *quo warranto*. The caſe depending upon ſeveral adjournments, the biſhop dies.—By this record two things appear:

1. That in the time of E. 3. there were payable two ton of twenty, not two of thirty, as is ſurmiſed in the petition of the firſt and ſecond of Henry 4. above-mentioned.

2. That as the biſhop of Durham claimed priſage in the port of Hartlepoole in right of the county-palatine by preſcription, ſo *de facto* he enjoyed it.

And thus much ſhall ſuffice concerning priſage.

CAP. IV.

Concerning the cuſtomary duties, that are or were anciently due in ports by uſage or cuſtom.

THERE were anciently very many duties due in ports which were uſually called *conſuetudines* and cuſtoms, which belong to the king either as incident to his cuſtoms or as perquiſites to his ports, as alſo to other lords and owners of ports either by preſcription or charter.

Cuſtoms incident to the cuſtoms.—Such were the cuſtom of the cocquet, whereof before, viz. two-pence of every merchant exporting wools. And thereby it ſeems to be queſtionable in the reſolution of the caſe of Waterford, whether the grant of *cuſtuma civitatis vocat.* the cocquet ſhould carry the great cuſtoms. And the ſtile of the accompt was *de exitibus cocketti.* But that which may be ſaid for it is, that under that grant they had long enjoyed the great cuſtoms, which expounds the charter to extend to it by that name.—The cuſtom of tronage, viz. 2*d. ob.* for every ſack of wool, whereof before.

Cuſtoms by preſcription belonging to ports, were various according as the uſage and cuſtom was.

Some were in reſpect of ſhips or veſſels themſelves, that came into the port; as anchorage and culage or keelage, which were certain ſums taken for the ſhips, in ſome places more, in ſome places leſs. *Vid. P.* 40. *E.* 3. *Rot.* 73. The earl of Surry, as lord of the town and port of Poole, claimed by preſcription *quaſdam cuſtumas, viz. pro ancboragio et culagio de quâlibet navi in portu prædictâ applicante duos denarios, et diverſas alias cuſtumas, &c.* and brought his action for diſturbance.

Again, ſome were in reſpect of goods imported into the port. Thus, in the former record, the ſame earl claimed by preſcription *diverſas alias cuſtumas, viz. de quolibet dolio vini in navi infrà portum prædictum applicante duos denarios, de quâlibet centenâ averii ponderis duos denarios, de quolibet mille alecis rubeæ unum denarium*; and brings his action againſt them that diſturbed his miniſter in collecting them. Such were thoſe priſes or cuſtoms belonging to the king in his port of Newcaſtle, which are before recited out of the record of 20. E. 1. and ſuch were thoſe petty cuſtoms of goods imported, which were anciently anſwered to the king in the port of Exeter; and they hold them as parcel of their farm unto this day, viz. *de quibus infrà.* Such are thoſe priſes that are taken by the town of Hull under the title of their fee-farm, whereof *vide ſtat.* 27. *H.* 8. *cap.* 3. 33. *H.* 8. *cap.* 33.

Some were in reſpect of their meaſuring of commodities imported, which were meaſurable by the buſhel, commonly called buſhelage, claimed as before by the biſhop of York in the water of Hull, *M.* 44. *E.* 3. *B. R. ubi ſuprà*, and enjoyed by the king in the port of Plymouth, as belonging to the caſtle of Trematon.

Theſe, and ſuch like cuſtomary duties as theſe, were anciently anſwered to the king and other lords of ports; and they came under the name of *conſuetudines*, and would paſs by the general grant of *omnes conſuetudines*, or

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tolneta portûs de D. and a charter of exemption of toll-paſſage *et omni conſuetudine tàm per terram quàm per aquam* would have given an exemption from them; for they were little elſe but tolls, and much of the ſame nature; and accordingly theſe words in the ancient charters, mentioned in Davis's Rep. 16. *et alibi*, and eſpecially in old charters, had relation to theſe cuſtomary duties.

But theſe are not properly cuſtoms. The difference ſtood principally in theſe things:

1. Theſe were ſettled by preſcription and uſage in ſeveral ports; and therefore varied according as the ſeveral cuſtoms of ſeveral places obtained. But cuſtoms were regular and certain in all places; I mean ſuch as were truly ſuch.

2. Theſe belonged to the lords of ſeveral ports, whether it were the king or a common perſon, as we ſee in the inſtances before given. But cuſtoms belonged to the king, and to the king only, as the revenue and ſupport of his crown.

3. Theſe would be diſcharged by the charter of the king to the owner of the port by a grant to be quit *de theolonio paſſagio pondagio et omni conſuetudine per totam terram, &c.* But ſuch a grant would not diſcharge from payment of cuſtom, as is reſolved in the caſe of cuſtoms, Davis 16. Yet theſe cuſtomary tolls or duties came anciently under the name, not only of *conſuetudines*, but cuſtoms, as appears before in this ſection: and, as before obſerved, theſe ancient exemptions *ab omni conſuetudine tàm per terram quàm per aquam*, which were frequently granted, were intended to be applied to theſe cuſtomary payments.

The fulleſt account of this kind of cuſtoms is in an old book before mentioned, called *Conſuetudines et Uſus Sandwici.* It was begun to be written in the year 1301, *anno* 29. *E.* 1. by Adam Champneys; but it is continued down by ſeveral authors and hands unto the middle of Edward 3. and after.

By that book it appears, that in the year of Chriſt 1023, king Knute gave to the monaſtery of Chriſt-Church *Cantuar. ad victum monachorum, portum de Sandwich, et omnes exitus ejuſdem aquæ ab utrâque ripâ fluminis, cujuſcunque ſit terra, à Piperneſſe uſque Martell Fleet, ita ut natante nave in flumine, cùm plenum fuerit mare,* [*quàm*] *longius de navi ſecuris parvula, quam Anglici vocant Taperax,* [*poteſt*] *ſuper terram* [*projici*], *prout miniſtri Chriſti, rectitudines accipiant. Nulluſque homo omninò habeat aliquam conſuetudinem in eodem portu, exceptis monachis eccleſiæ Chriſti. Eorum autem eſt navicula, et tranſfretatio portûs, et theolonium omnium navium, cujuſcunque ſit, undecunque veniant. Si quid autem in magno*

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*mari extrà portum, quantum mare plus ſe retraheret, et adhuc ſtatu-am unius hominis tenentis lignum, quod Anglici nominant Spreete, et tendentis autem ſc, quantum poteſt, monachorum eſt. Quicquid etiam ex hâc parte medietatis maris inventum et delatum ad Sandwich fuerit, ſive ſit veſtimentum, ſive rete arma ferrum aut argentum, medietatis monachorum erit, altera pars remanebit mercatoribus.**

Under this charter the monks of Chriſt-Church held the port of Sandwich until 21. E. 1. and then the king took it in by way of exchange *Pat.* 21. *E.* 1

The king therefore, having the port under the grant of the prior of Chriſt-Church, and his ſucceſſors after him, had not only the great cuſtoms of wools, woolfells and leather, and his petty cuſtoms by virtue of *carta mercatoria* (for theſe he had in right of his crown, whoſe-ever the port is; and theſe were collected and anſwered by his cuſtomers); but beſides theſe the king, as lord of the port of Sandwich, held ſuch cuſtoms or *conſuetudines* as the prior had before as lord of the port.

The difference between theſe cuſtoms of *conſuetudines* therefore were theſe;

1. The true and proper cuſtoms were ſuch, as the king had in right of his crown. But theſe *conſuetudines* were ſuch, as the prior had before the exchange in right of his port, and and the king had afterwards as lord of the port.

2. The true and proper cuſtoms were by act of parliament, as the great cuſtoms; or by contract, as the petty cuſtoms. But theſe were ſettled by preſcription, firſt in the prior under the charter of king Knute, and after in the king by exchange with the prior.

3. The true and proper cuſtoms were collected and anſwered by the cuſtomer. But theſe *conſuetudines* were anſwered by the bailiff of the town, firſt to the prior in his time, and after to the king.

4. The true cuſtoms were of greater value than theſe; for we ſhall find, that wools, woolfells, and leather, which anſwered the great cuſtom of 6s. 8d. and 13s. 4d. anſwered a ſmaller cuſtomary payment.

Theſe things will more evidently manifeſt themſelves by the account itſelf of theſe cuſtoms, as it is entered, and accordingly

* In the *Decem Scriptores* there is a piece intitled, "*Evidentiæ Eccleſiæ Chriſti Cant.*" which contains a collection of charters to Chriſt-Church, Canterbury, from 1016 to the reign of Hen. I. and in this collection the charter of king Knute here extracted from by lord Hale is included; but the two copies differ very much. See Dec. Scriptor. Coll. 2225. In Lord HALE's tranſcript of the charter, there ſeems to be ſome omiſſion, to ſupply which the words between crotchets are here added from the tranſcript in the *Decem Scriptores*.—EDITOR.

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it was answered by the bailiffs of Sandwich, 12. H. 4. *Rot.* 200. The title is thus in the book, fo. 40.

Et oportet, quòd sciatur de his, quæ ballivicus facere debet de jure ex officio suo, ut dicitur postea, si ipsi colligere debet per se vel servientem suum aut per custumarium ad hoc assignatum custumam domini regis in hunc modum linguâ Gallicâ scriptum.

Some of the many particulars follow, for some of them are so obscure I cannot understand them.

	£.	s.	d.
De chescun tonnell de vin de Giens	0	0	8 *ob*
De chescun tonnell de vin de istiens	0	0	4
De chescun tonnell dayssel	0	0	4
De chescun tonnell de Bresse	0	0	4

And so for divers other things measured by tons.

De chescun cable	0	0	3
De chescun uptegh	0	0	1
De chescun sthete	0	0	1
De chescun notherope	0	0	0 *ob*
De chescun menn cord	0	0	0 *ob*
De chescun neise achate	0	2	0
De chescun battel vendu	0	0	2
De chescun ray a harringe	0	0	1
De chescun ray a makerell	0	0	0 *ob*
De chescun poys de sit	0	0	2
De chescun poys de furmage, &c.	0	0	1
De chescun cent de sturgeon	0	0	4
De chescun cent de samon	0	0	4

And so for fish.

De chescun daloum	0	0	2

And so for spices of all sorts.

De chescun bale de drape by	0	0	4
De chescun drape de leyn hors de bayl	0	0	1
De chescun sac de leyn	0	0	2
De chescun drap de ling tiel	0	0	0 *ob*
De chescun cent onnes de cannas	0	0	4

And so for fruits, dyeing stuff, &c. at several rates.

De chescun last de quires	0	0	4
De chescun dere de quires	0	0	2
De cent peaux de berbys	0	0	4

And so for various kinds of leather and furr at various rates.

De

	£.	s.	d.
De cheſcun neif à cuſtumer qt. ele vient doutre le mere	0	0	2
De neife que va per le coſtere de Angltere en cheſcun quarter de lan	0	0	2
De cheſcun home que paſſe le mere	0	0	2
De cheſcun home ove chival pur ſe et ſon chival	0	0	2
De cheſcun chival ſans home	0	0	2
De cheſcun chien veigaant ou alant	0	0	4
De cheſcun beef	0	0	2
De cheſcun pore	0	0	1
De cheſcun agne	0	6	8

Theſe be ſome of thoſe many payments that are there declared to be the bailiff's account; and accordingly I find this note at the foot of the particulars in an old hand:

Nota in comput. Johannis Rogeri et Ballivorum Sandwic. anno 12°. regis H. 4. Rot. 250. Compotus Ricardus de prædictis cuſtumis.

Somewhat of the like nature I have ſeen in an ancient manuſcript book of the cuſtoms of London, written about the time of king E. 3. which mentions ſeveral kinds of cuſtoms or tolls belonging to the city under ſeveral titles, viz: *Cuſtumas de Smithfield, Cuſtuma vici portûs de Namby*; and under this latter title, after many particular cuſtoms of veſſels laden with herring, muſſels, makerell, congre, are theſe cuſtoms, viz.

	£.	s.	d.
De cheſcun neif que ſet à travdura de ſtrandage	0	0	2
Et un petit neif de harlock que ſeit atra durra	0	0	1
Et battell que ſet à terra durra	0	0	0 *ob*
De 2 quarters de blée meſmes per le quarter le roy	0	0	0 q^a.
De un commble de blée que vent per le lag	0	0	1
De cheſcun quartre de weyde iſſant hors de citty per le Ew	0	0	1 *ob*
De 2 quartres de carbone de memeſures per quarter le roy	0	0	0 q^a.
De cheſcun tonnel de ce voys iſſant ou mere per merchants ſtranger	0	0	4
Si null eſtrange meſne hors de la citty mulnel per Ew durra de 100	0	0	2

Merchant eſtrange meſne leyne outre le mere payer per un ſaak que tient 2 peiſes 6d. et pur cockett 2. Et s'il n'a pluſeurs ſaaks de 2 peiſes, il payer pur le primer ſak 6d. pur cheſcun des autres 5d. Et ſi merchant eit pleſours ſaaks que tenient 2 peiſes et demy, ou 3 ou 4 pyſes, il durra de primer ſaak 11d. et pur cheſcun des autres 10d. et touts jours pur aver le cocket durra 2d.

Si

	£.	s.	d.
Si merchant meyne outre le mere bure ou oynt, durra pur le primer peys 1*d. ob. et de outre peyſes ob.*			
Et pur cheſcun peys de furmage iſſant outre mere	0	0	4
De cheſcun laſt de quires iſſant outre mere et de cheſcun daire de quire 2*d. et de quire noumper*	0	0	0·*ob*
De cheſcun truſſel de quire en cares -	0	0	4
De cheſcun c. de penax lanus - -	0	0	4
De cheſcun truſſel ly eu cordes de quel merchandiſe quel ſoit petit ou grand - - -	0	0	4
De hartois de fiſhpond - - -	0	0	1 *qa.*
De cheſcun truſſel de draps iſſent ouer grand ou petit	0	0	4
De cheſcun tonel de vyn que cuſtom deit -	0	0	1
De cheſcun grant ueif. qe. ſet a tra -	0	0	2
De cheſcun tonel de meel qe. cuſtom deit	0	1	0
De cheſcun cave de pluma iſſant outre mere per home eſtrange - - -	0	0	4
De un li de leyn a foren ob. de 2. *peaux launts ou plus ob. de* 100 *ob. de un lib. de filas leyn ob. de un ciſors ob. ſi mil foren port leyn peaux ou file a la value de* 10d. *ou plus pair ob. qa.*			
Les merchandiſes qe. ſont peyſes per le balance, de 100 *durra ob. et nient pluis jeſque a miller, et tunc durra* 1*d. et* 1100 *durra* 1*d. ob. et nient pluis jeſque a* 2000, *et dunque durra* 2*d. et avant.*			

And theſe ſeem to be in the nature of tolls. But the citizens, being by charter quit from tolls, pay not theſe duties; and the word *ſtranger* is not intended only of aliens, but foreigners, or ſuch as are not freemen of the city.

By this it appears, that in ſome things theſe ancient tolls and cuſtoms, in London, Sandwich, and other ports, agree, and in ſome things they differ, as will appear by comparing the ſums. But yet length of time hath made great alteration in theſe tolls. The tolls by water, in London, have been uſually demiſed to their water-bailiff in farm. And very late, in the exchequer, the water-bailiff brought an action againſt a foreigner for the toll of wines brought into the port of London; and upon the trial produced many old records to prove this cuſtom due, viz. 12d. per tun. But inaſmuch as he could produce no proof of any ſuch cuſtom paid; but, on the contrary, great evidence was given by the merchants, that the toll or cuſtom was never demanded, which yet would have riſen to a very great ſum in the year, viz. 2000l. or 3000l. *per annum*, at length the plaintiff was nonſuited.

I ſhall

I ſhall only add the petit cuſtomes of Exeter, which they claimed as parcel of their fee-farm, by grant made by king E. 3. unto them of the port of Exeter, *cum membris*, and the ferry of Exmouth, and laſtage and ſtallage of the ſaid ferry, as they were decreed unto them by default in a ſuit between the bailiff and commonalty of Exeter and one Wade, 9 *Feb. Hill.* 14. *Car.* 2. as followeth.

9. *Feb. Hill.* 14. *Car.* 2.

Bailiff and commonalty of Exeter againſt Wade.—Sets forth the city holden in fee-farm at 20l. *per ann.* rent by the charter of E. 3.—That the port and haven of Exeter, and ferry of Exmouth, and laſtage and ſtallage of the ferry, are parcell of the farme.—That they are uſed to take under the name of petty cuſtoms of all goods, imported into that port in ſhips, boats and other navigable veſſells, theſe duties following, under the names of petty cuſtomes or town cuſtomes:

	£.	s.	d.
For every 100 weight of ſugar	0	0	0 q^{a},
For every 100 weight of madder	0	0	1
For every 100 deal-boards	0	0	1
For every bale of packing canvas	0	0	3
For every 100 of cable yarn	0	0	1
For every tun of rodd iron	0	0	8
For every hogſhead of wine-lees	0	0	1
For every 100 of twyne	0	0	1
For every hogſhead of ſtrong-waters	0	0	4
For every laſt of pitch	0	1	0
For every 100 of dreſſed flax	0	0	1
For every dozen of ſtone-cupps	0	0	0 ½
For every piece of tufted Holland	0	0	2
For every 100 weight of latten-wyre	0	0	2
For every hogſhead of ſalt	0	0	2
For every piece of lockorum	0	0	0 ½
For every ream of white paper	0	0	0 ½
For every hogſhead of Rheniſh wine	0	0	0 ½
For every 100 weight of hops	0	0	4
For every fatt of wooden ware	0	0	1
For every 1000 of bricks	0	0	1

Directed to be tried at law, and in default of the defendant's proceeding decreed for the plaintiff.

And

And by this it appears, that although theſe were called cuſtomes, and poſſibly they were all that were anciently anſwered as cuſtomes, yet they were quite of another nature than thoſe which are now, or in the time of E. 1. were truly ſo called. And they became a cuſtomary duty by preſcription and uſage in nature of a toll, and connected in point of property by uſage and preſcription to the lord of the port. And the king, together with the port of Sandwich, had doubtleſs theſe cuſtoms or tolls as incident or belonging unto it. And they were quite of a different nature from thoſe which were really cuſtomes; for we well know the cuſtome of wooll by denizens was 6s. 8d. but here was anſwered only 2d. The cuſtom of three hundred woolfells was alſo 6s. 8d. but here was anſwered only 4d. for one hundred. The cuſtom of a ſack of wooll was 13s 4d. but here was anſwered only 3s. 4d. And at the ſame time both cuſtoms were anſwered by the cuſtomers and collectors; and yet this cuſtomary cuſtom was anſwered by the bailiffs.

Indeed it may be poſſible, that in the infancy, as it were, of cuſtoms, and before they were reduced to ſo conſiderable advance as afterwards happened, viz. in the times, poſſibly, of H. 1. king Stephen and H. 2. theſe were the only cuſtoms that were paid; and having ſo continued for a long time, they might grow into a fixed and cuſtomary duty: and though poſſibly, afterwards, ſome other cuſtoms or advances thereof might be introduced that were of great value, the other might be retained. As we ſee hath happened in former times, though there were new ſubſidies granted, yet the old poundage ſettled by *carta mercatoria* might and did continue: and ſo it might happen, that poſſibly theſe kinds of port duties were, in ancient time, all the cuſtoms that were anſwered, and that by new proviſions there might other more conſiderable cuſtoms ariſe, and yet the old be retained under the name of tolls, or it may be under the name of cuſtoms; and being grown inconſiderable in length of time might be granted to the ſeveral corporations of thoſe ports or towns wherein they were taken as part of their farms; as was done in the caſes of Exeter and Yarmouth, Kingſton upon Hull, and ſome other ports, which enjoy ſuch like cuſtomary payments as part of their farms, ſometimes by the name of tolls, ſometimes by the name of petty cuſtoms, and the like; the crown being in no condition eaſily to ſpare ſuch little inconſiderable things, when cuſtoms of a greater value were either taken by or ſettled upon it, as it happened in the time of king John, H. 3. E. 1. and other ſucceeding kings.

CAP.

CAP. V.

Concerning the king's cuſtomes, and how they ſtood before the time of king Edward I.

I COME now to that which I principally intended, viz. a legal hiſtory of the king's cuſtomes, properly ſo called; and therein I ſhall proceed according to the ſeries and order of time and the kings reigns.

After the beginning of the reign of king Edward I. the cuſtoms were well ſettled in a regular way; and the monuments thereof, both in reſpect of their original and progreſs, are extant of record, and are capable of a fair deduction downward. But before the beginning of the reign of king Edward I. the times were tumultuous and unſettled, and the records relating to thoſe cuſtoms are either not to be found, or otherwiſe they are very brief, dark, and uncertain.

Yet I ſhall endeavour in this chapter to collect and put together what memorials I can find concerning the cuſtomes before the time of king Edward I. and what may be collected from them touching the ſame; and the enquiries ſhall be theſe:

I. Whether there were any cuſtomes ſettled in the crown beſides that of priſage before the time of king Edward I.

And,

II. If any, what they were.

I. Touching the former of theſe enquiries, viz. whether there were any cuſtoms due to the crown before the time of king Edward I. it ſeems with ſome clearneſs, that there were; but not in that great proportion, nor in that regular way of collection, that they were afterwards.

And here the queſtion is not intended of ſuch cuſtomary preſtations as were anſwered to the lords of the ports by uſage or preſcription, whereof in the former chapter. For without queſtion ſuch payments were very long due, though they might poſſibly vary in ſeveral ports, as is before obſerved, and they were frequently called cuſtomes and *conſuetudines*. But theſe were petty ſmall matters; and of this kind theſe ſeem to be *Placita* 11. *H.* 3. *in Arce Lond. Rot.* 5. and *Pat.* 34. *E.* 1. *m.* 37. *dorſo*, where the cuſtomes of ſhips and other things in Lodagland belonging to the town of Yarmouth are recited; and *Placita de juratis*, 47. *H.* 3. *Rot.* 38. *dorſo*, the cuſtomes in the port of Seaford in Suſſex, then belonging to the earl Warren. *Vide Pat.* 33. *E.* 1. *p.* 1. *m.* 8. for the cuſtomes in the cinque ports.

But

But beſides theſe, it appears plainly there were other duties of greater moment anſwered to the crown; and it is ſaid in the black book of the Admiralty, fo. 16. that they were reduced by king John to a certain rate. The words of the book are, *que roy Johan fiſt un ordinance, que un manner de cuſtume ſoit priſe per tout le realm de Anglitere en ewe.* And hence it is, that in all the ancient ſafe-conducts, that were granted to foreign merchants, this clauſe is inſerted, *faciendo edbitas antiquas et rectas conſuetudines*; as to thoſe of Gaunt *Cart.* 43. *H.* 3. *m.* 2. *of* Rodenburgh *Pat.* 46. *H.* 3. *p.* 2. *m.* 2. to the Spaniſh Merchants, *Pat.* 47. *H.* 3. *p.* 1. *m.* 11. and *Clauſ.* 48. *H.* 3. *m.* 3. to thoſe of Brunſwick *Pat.* 51. *H.* 3. *m.* 31. of Hamborough *ibidem*, *m.* 36. of Ipres *Pat.* 57. *H.* 3. *m.* 15. *dorſ.* of Britain *Pat.* 54. *H.* 3. *m.* 14. of Lovain *Pat.* 55. *H.* 3. *m.* 15. of Orleans *Clauſ.* 2. *E.* 1. 7. *dorſ.* of Sienna *Pat.* 3. *E.* 1. *m.* 21. all which were before the ſettlement of the great cuſtomes, as ſhall be ſhewn.

And to this purpoſe may be produced the account of Cheſhire in Doomſday. *Vide* Selden Titles of Hon. 620. *Cart.* 1. *Johannis p.* 2. *m.* 26. *dorſo*, concerning the free trade of merchants-ſtrangers; *Rot. oblat.* 3. *Johannis m.* 4. concerning the cuſtoms of Briſtol; and *Pat.* 6. *Johannis m.* 11. ordinances concerning the French merchants; whereby it appears, that during the wars with France, all merchandizes, except corn, wine and ſalt, exported into France or imported from thence, paid the fifteenth part of their value during the war. But it ſeems, by theſe ordinances, the generall cuſtom of merchandizes, as well woolls as others, was the twentieth part of their value. *Pat.* 17. *Johannis m.* 16. touching the merchants of France, and the diſcharge of *mala torta*. And *Rot. Pat.* 50. *E.* 3. *m.* 22. *n.* 60. the king granted to prince Edward certain cuſtoms, viz. *rationabilis aliqua portio* of the merchandizes. And in Sir John Davis's Reports, 16. mention is made of a pipe-roll of the time of H. 2. *Vicecomes Norf. et Suff. reddit compot.* 45*l.* 16*s.* 6*d. de conſuetudine navium de Orford.* And in the pipe-roll of 5. R. 1. *Albertus de Billingſgate debet* 72*s. conſuetudine de Billingſgate et Buttolfsgate*, though this latter ſeems to be only a toll, not a cuſtom. *Vide* Dyer 65. And the ſtat. of *Magna Carta*, *cap.* 30. grants, that merchants ſhall come into England *ſine aliquibus malis tolnetis per antiquas et rectas conſuetudines.*

And beſides theſe fixed and ſettled cuſtoms, it is apparent, that there were temporary impoſitions, or rather ſubſidies, anſwered to the crown. *Pat.* 50. *H.* 3. *m.* 22. *n.* 60. the cuſtoms granted to the prince; *et m.* 28. *Pat.* 57. *H.* 3. *m.* 1. *Pat.* 51. *H.* 3. *m.* 37. *Pat.* 54. *H.* 3. *m.* 10. *Pat.* 3. *E.* 1. *m.* 29.

So

So that as to the firſt point certain it is, that beſides the port duties incident by preſcription to the ſeveral ports, whether in the hands of the king or of a ſubject, there were cuſtomes anſwered to the crown; and thoſe cuſtoms did not come under the name of toll, nor a charter to be quit of toll did not exempt or diſcharge them; for they were clearly of another nature, 39. E. 3. 13. the caſe of the men of Marlborough and Southampton.

But though it be very plain, that there were cuſtomes, and thoſe alſo of a conſiderable value, yet what they were is difficult to determine; and the rather, becauſe we have no cuſtomers accounts that can be found in the pipe before the time of E. 1. Yet we muſt try what we can gueſs.

II. Therefore as to the ſecond inquiry, what was anſwered, and for what goods.

(1.) Touching goods imported there was ſome cuſtom anſwered; and principally of theſe two kinds.

Firſt, for wines imported, beſides the duty of priſage, there was anſwered to the crown, both in king John's time and after, a conſiderable duty, viz. eight-pence upon every ton, which in the ſingle port of Southampton was then farmed at 200l. *per annum*; which in the very intrinſical value of the money, allowing twenty-pence to an ounce, would at this day amount to 600l. *per annum*. This appears by the book of 39. E. 3. 13. And there it is admitted, that this is cuſtom, and not toll, neither is it diſcharged by the acquittal of toll. And ſome ſuch cuſtom it was, that *Pat.* 38. *H.* 3. *m.* 2. is releaſed to the merchants of Bourdeaux by the name of *exactiones et priſa tonellorum*, except a kind of tonnage of wine then in uſe, with this clauſe alſo, *tamen conſuetudines denariorum, ſingulis doliis in diverſis portubus impoſitæ, à mercatoribus perſolvantur eodem modo et eâdem formâ, quâ ſecundùm diverſitatem portuum ſolvi extitit conſuetum.* *Vide* in the caſe of Poole before, the earl of Warren had 2d. for every ton that came into that port, and poſſibly it might be a part of that 8d. which the king had. And thus much for wines.

So it might poſſibly and very probably be, that ſome cuſtom was anſwered the king in nature of poundage for goods of averdupoiſe. We ſee it was ſo anſwered to the earl of Warren in Poole, viz. *de quâlibet centenariâ ponderas duos denarios.* And it ſeems that ſome ſuch cuſtom or impoſition was anſwered to the king in the times of H. 3. and the beginning of E. 1. of other merchandizes imported as well by denizens as ſtrangers. *Pat.* 50. *H.* 3. *m.* 22. the king grants to the prince, that merchants-ſtrangers may come into the kingdom with the licence of the prince, and upon theſe conditions;

conditions; *quòd de omnibus mercandiſis, per ipſos vel quoſcunque alios, in regnum noſtrum venientibus vel regno noſtro exeuntibus, aliquam rationabilem portionem percipiet, unde mercatores ſuper medium non graventur.* And *Pat.* 3° *E.* 1. *m.* 29. a deputation bearing teſte 27 *Martii* iſſued to the merchants of Lake *ad quandam conſuetudinem, per totum regnum Angliæ, de rebus et mercimoniis infrà, idem regnum venientibus, uſque Octobr. Paſchæ proxim. futur. capiend. ſicut priùs fieri conſuevit.* So that a cuſtom inwards was anſwered till that time; and poſſibly it might be diſcharged upon the grant of the great cuſtome of woolls and leather in that year; for I find not any thing anſwered by ſubjects or aliens for merchandizes imported between the 3. E. 1. and 31. E. 1. when the *carta mercatoria* was granted, beſides priſage.

And thus much touching cuſtoms of goods imported.

(2.) Touching the cuſtom of goods exported, and therein principally of woolls.

It is certain, that in the ancienter times, eſpecially in H. 2. and R. 1. time, there was a great trade and manufacture of cloth here in England, and the great mart for the vent of Engliſh cloth was the fair of St. Butalfe or Boſton; and this appears,

1. By the Hiſtory of Hoveden, who mentions the great diſturbance that happened among the merchants of that fair, becauſe of the ſtrict meaſure of cloth that was then put in uſe *in tempore Ricardi primi.*

2. By the ſtatute of *Magna Carta*, *cap.* [illegible] concerning the meaſure of cloth of ruſſet and other.

3. By thoſe many guilds of weavers in many of the great inland towns at very conſiderable rents, which after, as the manufacture decayed by the civil wars, got allowance and defalcation of their farms, as in London, Lincoln, Oxford, and divers other places. And ſome little footſtep there is of that trade by the Tinctors of Rippon by cuſtom, that none may dye cloaths there but thoſe of their fraternity. *Regiſter* . And accordingly the guild of *Telarii*, London, by virtue of their ancient charter from H. 2. which I have ſeen, and the uſage thereupon, have power to reſtrain any that weave, not being of their guild. And therefore it might poſſibly happen, that in thoſe times the cuſtom might not be anſwered for woolls but for clothes; becauſe it ſeems the great commodity of wooll might in thoſe times have been made into cloth.

But in the times of the diſtempers and civil wars in England in the times of king John and H. 3. that manufacture was in great

great meaſure loſt, and the woolls were tranſported into foreign parts, and there turned into cloth. So that if in theſe times there ſhould have been no cuſtom anſwered for woolls, which was the greateſt commodity of this kingdom, there was nothing that could have anſwered the king a conſiderable cuſtom outwards; and therefore it ſeems probable, that there was a cuſtom outward anſwered for woolls exported.

And indeed it is apparent it was ſo, though I have not met with the certain proportion that was ſo anſwered; for the ſtatute of 51. H. 3. called *Statutum de Scaccario* doth expreſsly mention it, and provide how the collectors thereof ſhall account, viz. *et les principalls cuillors des cuſtomes de laines payont, a les deux termes avantdits; touts les deniers qu'ils ont receive et priſes de l'avant dit cuſtome, et de an en an rendent accompts apertement de touts les parcells receives per touts les ports et par tout le terre, iſſint qu'il reſpoigne de cheſcun neife, ou ele ſera charge, et combien ele portera de la leine; et d'autre charge en le neife de que cuſtume eſt due; et de tout le reſceit.*

By which it is apparent, that there were cuſtoms of woolls, though it appears not what was the proportion that was anſwered; neither can I diſcover it, though I have made a ſtrict ſearch after cuſtomers accounts in the times of H. 3. and in elder times.

The remedy for the cuſtomes at the common law ſeems to be only a diſtreſs of the goods of the merchant. *Vide* accordingly done 39. H. 3. 13. in the caſe of Southampton. But for *oblata* the 3. *Johannis* R. 4. a mandate iſſued to the conſtable of the caſtle of Briſtoll to ſeize the ſhip and goods of a merchant that had concealed his cuſtome, and thereby to levy double the value of the cuſtomes, and double the damage that the king had ſuſtained for want of them. But this was an extraordinary and arbitrary remedy. The proper remedy for the duty itſelf was in the exchequer; for there was no law then for a forfeiture of the goods, that I have ſeen.

And thus much ſhall ſerve for an eſſay touching the cuſtomes in that dark time that was before king Edward 1. Only thus much is to be added, that all or the moſt part of the various cuſtomes ſo antiently uſed vaniſhed, as to ſubjects born, by the great cuſtome of wooll and leather ſettled 3. E. 1. and as to aliens, by the great contract or *carta mercatoria*, 31. E. 1. and were not afterwards anſwered *.

* Mr. Madox, in his Hiſtory of the Exchequer, gives a chapter on the revenue of the cuſtoms, during the ſame early period as is here undertaken by lord Hale; which I remind the reader of for the ſake of connecting all the materials hitherto publiſhed on this dark part of the ſubject. Mad. Excheq. c. 18.—EDITOR.

CAP. VI.

The narrative of the cuſtoms, and their ſeveral originals and alterations, as they ſtood in the time of king Edward 1.

I COME to times of ſome more light; viz. the reign of king Edward 1. who was as wiſe a prince as ever ruled this kingdom; for he builded up this kingdom by good laws and wiſe government; out of the ruins and deſolations which a long civil war had introduced; and the firſt thing he began with was to ſettle trade, and a certain revenue to the crown, by a more regular and ſettled rule and eſtabliſhment of the cuſtoms.

The foreigners and aliens had indeed gotten all the trade of the woolls of England into their own hands, and thereby ingroſſed it wholly into their own power.

The king obſerving this, and withall having a deſign to ſettle the cuſtomes as well as to rectify this diſorder in trade, in the very entrance into his reign iſſued a proclamation, that no woolls ſhould be exported out of the kingdom. Touching the legality of this inhibition, if made without conſent of parliament, I diſpute not here. But howſoever it at preſent ſerved the purpoſe deſigned by it.

Pat. 2. *E.* 1. *m.* 19. *dorſo*; a ſtrict commiſſion iſſues to enquire what woolls were exported againſt that inhibition, and by whom, and whether done after notice of this inhibition.

There being this reſtraint upon the exportation of woolls, it was now ſeaſonable to ſet on foot a ſettlement of the cuſtomes intended principally to be charged upon that commodity.

1. Becauſe the country and the merchants, being under this reſtraint, would in all probability be more yielding to the inhauncing of the cuſtomes upon theſe commodities, that thereby the reſtraint might be removed, and the ports open to the exportation.

2. Becauſe by this means there would be in all probability a large proportion ready to be tranſported, as ſoon as the ports ſhould be open; and thereby the intended cuſtomes would be the greater, at leaſt upon the firſt opening of a liberty of exportation.

Shortly after, viz. in the parliament of 3. E. 1. which was that parliament which is called Weſtminſter the firſt, held *craſtino poſt clauſam Paſchæ anno* 3. *E.* 1. as appears by the preface of that ſtatute made for the ſettling of the great cuſtome of woolls,

woollfells and leather, upon the crown, and then and for almost thirty years after it was called *Nova Custuma.*

This act is entered *inter fines* 3. *E.* 1. *m.* 24. *Pat.* 3. *E.* 1. *m.* 1. and *Originalia de anno.* 3. *E.* 1. in the exchequer, and in the red book of the exchequer fo. 356. which, because it is the basis and foundation of that great custome, and doth explain very many difficulties and rectify many mistakes concerning the great customes, I have thought fit to insert *verbatim* as it is in the record, viz.

De Nova Custuma Lanarum Pellium et Coriorum in Originali anno 3 . *regis F. R. H.*

A la novele custume, ke est graunte par tous le graunz del realme, par la priere des comunes des marchaunts de tout Engletere, est purveu, ke en chescun conte, ou la grem'ore vile ou port est, soient eslut deaus de plus leaus e plus pussaunz, ke averont une pece de un seil en garde, en un, ke sera assigne par le roi, avera un autre pece, e seront jurez, ke leaument rescevront et responderont des deniers le roi, cest asavoir de chescun sak de laine demi mark, e de chescun treis cent peauls ke sunt un sak demi mark, e de chescun last de quyre un mark, ke isceront hors del realm, ausi bien en Hyrlaund en Wales come en Engletere, de denz fraunchise e de hors. Estre ceo en chescun port, ou nefs pount issir, seront deus prodes hommes jurez, k'il ne sufferount a issir laynes peaus ne quyrs sanz leattre overte a la seel, ke sera au chef port en le counte. Et s'il est mil ke autrement sen isse hors del realme, ausi bien il perdra tout les chateus k'il a e sun cors sera a la volunte le roi. Et pur ceo ke ceste chose ne pouv tost estre per furing, est purveu, ke le roi enveie ses lettres a chescun vesconte per tout le realme, e fait crier et defendre par touz les contes, ke nul, sor forfeture de son cors e de touz ses chateus, ne face mener hors de la terre laynes peaus ne quyres avaunt la feste de la Trinite en cest an, et adunkes par lettres overtes od le seaus si com est andudroe encime autrement sir les avantdites forfetures. Et le roi ad graunte de sa grace, ke touz les seigniorages, par quy porz laynes ou quyres isteront, averont les forfetures quant eles deviendront, chescun en sun port, sauve a roi demi mark de chescun sak de layne e des peaus, e un mark de chescun last de quyres.* And accordingly *verbatim Finis* 3. *E.* 1. *m.* 24.

* On account of the great curiosity and importance of the preceding extract from the *Originalia* of 3. E. 1. I compared the transcript here given with the record itself, now in the custody of the Treasurer's Remembrancer of the Exchequer, and made it as exactly conformable to the original, exclusive of the punctuation, which is not in that, and of the abbreviations, as was possible. Mr. Chapman, the deputy-remembrancer, most obligingly assisted me on the occasion. The extract is from the *Originalia* of 3. E. 1. m. 15. which in the margin is marked No. 12. 13.---The extract from the record begins with the words *A la novele custume.*---EDITOR.

And

And according to the purport of this inhibition of exportation within the time limited by this act, divers merchants-ſtrangers were ſett at great fines for exporting of woolls contrary to that inhibition. Their fines were ſett in the king's-bench; and anſwered in the accounts of the collectors 4. E. 3.

Upon this record many things are obſervable, which give a greater light to the whole buſineſs of the great cuſtomes; and hereby the original of many things concerning the ſame are diſcovered, which without this would be obſcure and dark.

1. By this record it appears, that theſe great cuſtomes are not by preſcription, as is ſaid in Dy. 165. but it had its original in the time of king Edward 1. and it then was called *Nova Cuſtuma*, and continued that ſtile until the 22. E. 1. when a new inhanced cuſtome of woolls was ſett, called *Nova Cuſtuma*, as ſhall be ſhewn; and then and not till then the cuſtome of woolls, woollfells and leather, took the name of *Antiqua Cuſtuma*. And this appears by very many records, viz. in *Pat.* 14. *E.* 1. *m.* 19. it is called *Nova Cuſtuma*, and all the collectors accounts from the 4. E. 1. until the 28. E. 1. of theſe great cuſtomes are ſtiled *Computus, &c. de Nova Cuſtuma.*

Indeed about 22. E. 1. the king had ſett a new impoſition upon woolls of 40*s.* a-ſack; and then the former was called *Antiqua Cuſtuma.* And this maltolt was called *Nova Cuſtuma*; and ſhortly after, when that maltolt was abrogated by parliament, there came in the *Carta Mercatoria* of 31. E. 1. whereby the ſmall cuſtomes were ſettled in the crown; which were ſometimes *Nova Cuſtuma.* So that the great cuſtomes of woolls, woollfells and leather ſettled 3. E. 1. kept their title of *Nova Cuſtuma* till the great impoſition of 40*s.* per ſack in 22. E. 1. and then that took the name of *Nova Cuſtuma*, and the former loſt its name of *Nova Cuſtuma*, and became *Antiqua Cuſtuma*: and when that impoſition was taken away, yet the cuſtomes of 3. E. 1. did not reſume their name of *Nova Cuſtuma*; neither well could they, for there preſently ſucceeded the *Carta Mercatoria* in the 31. E. 1. which ſettled a new courſe of cuſtomes upon ſtrangers, and was frequently called *Nova Cuſtuma.*

2. The ſecond thing obſervable is, that as this cuſtom began in 3. E. 1. ſo it began not by impoſition of the king, nor by compoſition with the merchant, but by act of parliament. This tranſcript in the fine roll and the red book of the exchequer, if it be not the very tenor of the act, yet it is the very ſubſtance and matter of it. There are no parliament-rolls of that parliament, nor for many after; but the very ſame thing *in totidem verbis* is entered *inter Originalia de anno* 3. *E.* 1. and *Rot. Finium* 3. *E.* 1. *m.* 24. And accordingly *Rot. Parl.* 3.

E. 1. *m.* 1. and likewiſe *Brevia* 16. *E.* 1. cited by Sir Edward Cooke in his comment upon *Cap.* 30. of *Magna Carta**. and alſo *Clauſ.* 26. *E.* 1. *m.* 8. do all recite the original of this great cuſtom to be by act of parliament, viz. *Cùm prelati magnates et tota communitas quandam novam conſuetudinem nobis et hæredibus noſtris conceſſit de lanis pellibus et coriis, viz. de ſacco lanæ dimid. marc. de trecentis pellibus dimid. marc. de laſto corii* 13*s.* 4*d.* And therefore it is a miſtake in thoſe that have thought this cuſtom to be by the common law†; for moſt certainly it began in the time of king Edward 1. and began in that time by the ſtrength of an act of parliament. *Vide* alſo to the ſame purpoſe *Pat.* 4. *E.* 1. *m.* 1. *et* 19. *Pat.* 5. *E.* 1. *m.* 14. *Pat.* 6. *E.* 1. *m.* 20. *Fynes* 10. *E.* 1. *m.* 5. *Clauſ.* 10. *E.* 1. *m.* 5. *Clauſ.* 14. *E.* 1. *m.* 19. *Clauſ.* 16. *E.* 1. *m.* 9. all which and many more do ſtile it *Nova Conſuetuma.*

3. In the firſt inſtitution of this great cuſtom, we have the inſtitution of the collector and comptroller, viz. the *deux prodes homes*, which offices have been hitherto kept with the addition of a ſearcher, and in the port of London a ſurveyor: whereas anciently the cuſtoms in the ports were received by the king's bailiffs or port-reves.

How theſe officers are to be appointed, and for how long, and what their duty is, ſee the ſtatutes 1. *H.* 4. 13. 4. *H.* 4. 20. 13 *H.* 4. 5. 1. *Eliz.* 11. and other ſtatutes relating to their office and employment.

4. Together with the inſtitution of the great cuſtoms of wool, woolfells and leather, we have alſo the inſtitution of the cocquet, or acquittance teſtifying the payment of them. This began and continued with thoſe great cuſtomes, and did not concern in truth any other; ſo that by common appellation in many places, and in ſome records, the great cuſtome was called the cuſtome of the cocquet; and the town of Waterford claimed and enjoyed the great cuſtome by the grant of the cuſtom called the cocquet. Davies' Rep. 7, &c. The cocquet was a teſtimonial in the king's name, under the king's ſeal deputed for that purpoſe, teſtifying the payment of the cuſtoms. There were anciently two parts of the ſeal; one kept by perſons thereunto appointed, as appears by this grant; another part by the comptroller. But in proceſs of time the ſeal was entirely kept by the comptroller, or by the cuſtomer and comptroller.

* 2 Inſt. 59.—EDITOR.

† This opinion is to be found in Dy. 165. b. but Lord Bacon allows it to be a miſtake; though he was an advocate in parliament in favor of the crown's claim to impoſe duties at the ports by prerogative. See Lord Bacon's ſpeech in vol. xi. of the State Trials, p. 376. However, Sir John Davies, in his book on *The Queſtion concerning Impoſitions*, is not ſo conceding; but argues, that what is called a grant of a new cuſtom by parliament to the king, was only a diminution of the old one by the king in parliament. See p. 44. of that book.—EDITOR.

It

It anſwered the king a caſual profit, for which the collector anſwered upon his account as well as for the cuſtomes, viz. of every merchant ſhipping out theſe cuſtomable goods, two-pence, for which the collector of the cuſtoms anſwered upon his accompts yearly, from 3. *E.* 1. until the time of *H.* 6. and after, viz. *de exitibus ſigilli, quod dicitur cocquet.* This teſtimonial of the payment of cuſtoms is the warrant for the ſearcher to clear the ſhip and goods; and regularly, when this was once done, the ſubject was diſcharged. *Vide Rot. Parl.* 45. *E.* 3. *n.* 3. 46. *E.* 3. *n.* 23.

And the want of this was ſufficient for the ſearcher to ſeize the woolls, woollfells, and leather exported without this warrant; and the common ſtile of the ſeizures of merchandizes of this nature was, *quia non cocketteta nec cuſtimata.*

5. We have the place or port where the cuſtomes ought to be paid, and the ſeale of the cocquette depoſited. It was not in every port, but in the chief part of the country; which yet the kings were uſed to enlarge, to eaſe the merchants of that trouble; and ſometimes the cocquette was lodged in two or three ports in a county, where a merchant might pay his cuſtoms and have his diſcharge. But ſtill the deſignation of the ports was in the king's power, which created a great dependence in the merchant upon the king, as to theſe cuſtomes; for he could not export them without a cocquett, but they were ſubject to a forfeiture; and a cocquett he could not have but where the king had lodged his ſeal, which gave the king a great opportunity to hold the merchant to hard terms.

6. We have the puniſhment of exporting the merchandizes without paying of the cuſtom. The merchant forfeited all his goods, and his body was at the king's pleaſure, viz. ſubject to fine and impriſonment. It was not only a forfeiture of the goods uncuſtomed, but of all his own goods; and this ſevere puniſhment was applied only to theſe great cuſtomes, and not to other cuſtomes, for they were under gentler puniſhments, as ſhall be ſhewn.

But, beſides this puniſhment, proceſs of time introduced another, which was conſtantly put in uſe *, viz. if the maſter or owner of a ſhip did lade aboard any wooll, woollfell, or leather uncuſtomed, the ſhip itſelf was forfeited, at leaſt if the maſter were privy to the fact (but this concerned only thoſe merchandizes of woolls, woollfells and leather, and not any other kind of merchandizes); and accordingly this was frequently put in practice. *Clauſ.* 13. *E.* 3. *m.* 15. *Clauſ.* 38. *E.* 3. *m.* 13. *pro Johanne Ball. Clauſ.* 39. *E.* 3. *m.* 20. *pro Johanne Henrys. Clauſ.* 38. *m.* 29. *pro Johanne Thriuſco*, and infinite more of that kind.

* Clauſ. 31. E. 3. m. 5.

And

And therefore the ſtatute of 38. *E.* 3. *cap.* 8. was made to prevent that inconveniency, viz. that whereas the ſhips of divers people be arreſted and holden forfeit, becauſe of a little thing put into their ſhip not cuſtomed, whereof the owners of the ſame ſhips be ignorant; it is accorded and aſſented, that no owner ſhall loſe his ſhip from the 15th day of February next coming, for ſuch a ſmall thing put in the ſaid ſhip, not cuſtomed without his knowledge.

But this ſeverity did only extend to woolls, woollfells, and leather, and not to other ſorts of goods uncuſtomed, and ſo I remember it was agreed *M.* 3. *Car.* in the exchequer; for in other caſes only the goods uncuſtomed were forfeited, and not the ſhip or other goods, unleſs otherwiſe particularly provided by ſome ſpecial act of parliament in particular caſes, which we ſhall in due time meet with.

7. We have the perſons to whom the forfeitures were given, viz. to the king, if in his own ports; but if the forfeiture were in the port of another lord, the forfeiture is given to the lord of the port, ſaving to the king his cuſtome ſo concealed.

This was a fair *honorarium* given to the lords of ports; but I do not remember that ever I have read in any caſe that they enjoyed it. In a little time the king's intereſt and concernment over-ballanced, and carried the forfeiture to the king, together with the duty.

8. Here is the extent of this cuſtom thus granted. It was not only to England and Wales, but alſo to Ireland: and by virtue of this act of the parliament of England, the kingdom of Ireland was charged with thoſe cuſtomes; and it is under that right the king held theſe cuſtoms in Ireland, and holds them to this day.

It is true, ſhortly after this grant the king did remit it for ſometime in Ireland, and made an abatement for the ſame to the merchants of Florence that farmed it. *Clauſ.* 1. *E.* 1. *m.* 5. But it ſoon was reſumed and hath ever ſince continued, and continued under this and no other title, for any thing I have yet ſeen or read. *Vide Davy's Rep. fo.* 8. *et ſequentibus* the exemptions granted to Waterford.

9. We have the things that are charged with this cuſtom, the two great commodities of the kingdom, wooll, woollfells and leather.

For wooll, this was the great native commodity of the kingdom, and indeed the baſis of all the commerce of the kingdom.

At the time of the grant of this duty it was free for Engliſh or aliens, to export woolls to any place; but ſubſequent laws did *ſub modo* reſtrain, and at length wholly reſtrained the exportation; ſo that at this day there can be no cuſtom to the king by woolls, becauſe the exportation thereof now ſtands totally inhibited

hibited under great penalties. The progreſs of that inhibition was this:

By the ſtatute of 11. *E.* 3. *cap.* 1. the exportation of wooll, by denizens or ſtrangers, without licence of the king and his council, is forbidden under the pain of death.

By the ſtatute of 15. *E.* 3. *cap.* 6. liberty is given to all merchants to export woolls paying the ancient cuſtoms; and to the ſame purpoſe is the ſtatute of 18. *E.* 3. *cap.* 3.

By the ſtatute of the ſtaple 27. *E.* 3. *cap.* 1. *et* 2. merchants-ſtrangers may buy woolls at the ſtaples and tranſport them; but by *cap.* 3. Engliſh, Welch, and Iriſh, are prohibited to tranſport woolls, under pain of death, and loſs of goods and lands. By the ſtatute of 36. *E.* 3. *cap.* 11. free liberty of exportation of woolls granted as well to denizens as ſtrangers, paying the ancient cuſtoms.

By the ſtatute of 38. *E.* 3. *cap.* 6. the penalty of death upon tranſportation enacted by 27. *E.* 3. repealed; but the forfeiture of lands and goods to ſtand in force. By the ſtat. 43. *E.* 3. *cap.* 1. the ſtaple removed from Calais to the former places ſettled by 27. *E.* 3. By 12. *R.* 2. *cap.* 16. ſettled at Calais.

By the ſtat. 1. *H.* 4. the ſtaple of wooll, woollfells, leather, lead, and tin, as fixed it Calais.

By the ſtat. 3. *H.* 5. *cap.* 6. the ſtaple continued at Calais, cuſtomes paid here, and ſecurities given by the merchant to carry ſtaple commodities to Calais. By the ſtat. 2. *H.* 5. *cap.* 2. every merchant ſtranger buying woolls in England not coming to the ſtaple to be ſold, ſhall for every ſack of wooll deliver in to the Mint an ounce of gold.

By the ſtat. 18. *H.* 6. *cap.* 15. carrying of woolls, woollfells, leather, lead, or tin, by any perſon other than to the ſtaple of Calais, without licence of the king, felony, unleſs to the ſtreights of Morocco. What progreſs it had after, ſee the ſtat. 4. *H.* 4. *cap.* 14. *E.* 4. *cap.* 3.

So that the ſtaple continued at Calais for aught appears until it was loſt in queen Mary's time; and conſequently the exportation of ſtaple commodities to any other place under an inhibition; and then Calais being loſt to the French, the inhibition ſtands univerſal, unleſs in thoſe places which are particularly excepted.

But to clear all queſtion, by the late act of 12. *Car.* 2. there is a general inhibition of the exportation of wooll under moſt ſevere penalties; ſo that at this day the old cuſtome as to wooll and woollfells import nothing; becauſe the exportation of them is utterly prohibited at this day, and conſequently no

cuſtom

cuſtom ariſing thereby. And the caſe ſtands the ſame as to leather; for by the ſtatute 18. *Eliz. c.* 9. exportation of leather is likewiſe inhibited. Only by the late act of tonnage and poundage, 12. *Car.* 2. calf-ſkins of a certain weight are permitted to be tranſported.

But by the laſt rules of the book of rates at this day, during the continuance of the ſubſidy of tonnage and poundage, all theſe ancient duties for woolls, woollfells, and leather, and all other ancient duties upon merchandize, other than ſuch as are impoſed by that act or excepted, are put in ſuſpence.

Now what woolls were intended within this cuſtom, *vide Rot. Parl.* 8. *H.* 6. *n.* 47. a petition that lambs wooll ſhorting and ſcalding be not eſteemed chargeable to the great cuſtom of wooll and woollfells; but it obtained not.

10. We have the time when the cuſtom grows due, viz. when laden on board to iſſue out of the realm. Therefore if they were ſhipped to be tranſported to another port within the realm, no cuſtom due. But yet in ſuch caſe ſurety ought to be given for the tranſporting of them to that other port, or otherwiſe they ought to depoſit their cuſtomes till they bring a certificate of their lading them within the realm. *Vide Claſſ.* 7. *E.* 3. *p.* 1. *m.* 24. *Stat. Stapul.* 27. *E.* 3. *cap.* 15. *Rot. Parl.* 9. *H.* 5. *pars* 1. *m.* 33.

11. We have the quantity and the proportion to be taken, viz. for a ſack of wooll ſix ſhillings and eight pence, for 300 woollfells ſix ſhillings and eight pence, for a laſt of hides a mark. And herein we are to obſerve, that though the proportions be here fixed, yet the conſtant uſage hath always been, that the king ſhould be anſwered his cuſtomes *pro ratâ*, as for half a ſack or half a laſt, or for 150 woollfells.

Now touching the quantities themſelves what they are, by the old ſtatute * called "Compoſitio de ponderibus," *laſt coriorum conſtat ex viginti daker, et quodlibet daker conſtat ex decem coriis.* According to the ſame ſtatute, *ſaccum lanæ conſtat de duabus wagis, waga ponderat quatuordecim petras, et petra conſtat ex doudecim l b.* ſo that a ſack of wooll according to that eſtimate weighed 392lb. And 300 woollfells were eſtimated to anſwer a ſack of wooll, and therefore charged with the ſame cuſtom, viz. 6*s* 8*d.*

* 31. E. 1.—In Mr. Ruſſhead's edition of the ſtatutes, this antient writing is intitled *Tractatus de Ponderibus et Menſuris.* By the context it appears to be rather an explanation of the weights and meaſures by reference to the ſtatutes of the realm, than a ſtatute of itſelf.——EDITOR.

But

But by the ſtatute of 25. E. 3. ſt. 5. c. 9. the ſack, which before weighed 28 ſtone, is now reduced to 26 ſtone; and every ſtone 14 pound; which amounted to 364 pound, viz. leſs than the old ſack by 28 pound.

And poſſibly the old ſack even in thoſe former times was accounted too large; and therefore upon all the old accounts in the times of king E. 1. and king E. 2. there was anſwered upon every ſack of wooll *ob. et. qa.* viz. three farthings more than the cuſtom of the demy-marke, in a particular account, viz.

Et reſpondent de 3lb. viz. de quolibet ſacco lanæ ob. et. qa. which I think was not taken when the ſack was reduced by the ſtat. of 25. E. 3. to 26 ſtone.

A pockett of wooll contained half a ſack, and ſo did a ſerpler, whereof frequent mention occurs in record. A todd of wooll is two ſtone, viz. 28 pound.

12. And laſtly, we have the ſum that was anſwered, viz. demy-marke for a ſack of wooll, demy-marke for 300 woollfells, and a marke for a laſt of leather. The penny then weighed three-pence now; and conſequently a mark then amounts in bullion at this day to forty ſhillings, which in regard of the rates and valuation of things is now more than thrice what it was then. That, which was then worth forty ſhillings, is now worth above ſix, nay above ten pounds. And this ſeems to be about the twentieth part of the value, as things were then. See *Rot. Parl.* 17. *E.* 3. *n.* 17. the valuation of a ſack of wooll in every county. The medium ſeems to be about ten markes at that time.

And thus I have made a ſhort ſurvey of this great foundation of the great cuſtomes, and of the ſeverall conſiderations that ariſe from the ſame; and now I ſhall proceed in the next chapter with the progreſs thereof, and what farther occurred relative to the buſineſs of the cuſtoms in the time of king E. 1.

CAP.

CAP. VII.

The further proſecution of the buſineſs of the cuſtomes in the time of king Edward 1.

THE king (Edward 1.) having thus ſettled the great cuſtomes, in the very next year takes care for their collection and improvement; and having borrowed 23,000*l.* for his occaſions of the merchants of Lukes, the great cuſtomes are committed to them through all England and Wales, and Ireland alſo, upon account.

They held the great cuſtomes of England and Wales from the 4. E. 1. incluſively until about the 20. E. 1. The ſum of the account of the great cuſtomes of Ireland for the three firſt years aroſe to 5171*l.*

The medium of the revenue of the great cuſtome in England roſe to between 8 and 9000*l. per annum*; for inſtance,

	£.	s.	d.
A Feſto Dunſtani anno ſeptimo ad idem Feſtum anno 8. E. 1. - - - -	8108	13	5
For the next year ending 9. E. 1. - -	8688	19	3
For the next year ending 10. E. 1. -	8694	19	3
For the year ending 11. E. 1. - -	10271	13	3
For the year ending 12. E. 1. - - -	9098	7	0
For the year ending 13. E. 1. - -	8094	13	6

beſides ſome ports omitted in their former accounts, which in all theſe years aroſe to 409*l.* 7*s.* 0*d.*

For the year ending 15. E. 1. - -	8023	6	10
For the year ending 16. E. 1. - -	8860	6	1
For the year ending 17. E. 1. - -	9974	6	1

But as trade increaſed, ſo in all ſucceſſions of this king and his ſucceſſor's reign, the revenue of this and other the king's cuſtomes increaſed.

But if we take an eſtimate thereof in the time of H. 6. when there is an account given of the whole revenue, and of this among the reſt, viz. *Rot. Parl.* 11. *H.* 6. *n.* 24*. when woolls were charged alſo with a ſubſidy, as ſhall be ſhewn, the great and petit cuſtomes did not amount to above 7000*l. communibus annis*:

	£.	s.	d.
Viz. *Anno* 10. *H.* 6. - -	7780	3	1
Anno 11. *H.* 6. - -	6980	16	0 &c.

* This curious eſtimate is in the printed rolls of parliament, v. 4. p. 434.—EDITOR.

Thus

Thus the cuſtomes ſtood untill 22. E. 1. But the king, having occaſion for money for the warrs in France for the recovery of Gaſcoigne, treated with certain merchants, and there was a new impoſition upon woolls, woollfells and leather, which was called *Nova Cuſtuma, viz. de quolibet ſacco lanæ fractæ* 5 *marcæ, de quolibet ſacco alterius lanæ vel pellium lanatarum tres marcæ, de quolibet laſto coriorum* 20 *marcæ*; which afterwards in the ſame year was reduced to a lower proportion, viz. for every ſack of woolls and woollfells of any kind *tres marcæ*; and thus it continued for ſome time, as ſhall be ſhewn.

All this appears in the account of 28. E. 1. which is thus titled:

Compotus Petri Barton et Johannis Huſtwicke Collectorum Novæ Cuſtumæ lanarum pellium et coriorum apud Kingſton ſuper Hull.— Cuſtumam anno 22. mercatores regni in ſubſidium guerre, quam rex pro recuperatione Vaſcoine contra Gallicos intendebat, de lanis et coriis exeuntibus regnum, regi gratanter conceſſerunt, viz. de quolibet ſacco lanæ fractæ quinque marcas, de quolibet ſacco alterius lanæ vel pellium lanatarum tres marcas, de quolibet laſto coriorum 10 *marcas; quod quidem ſubſidium rex poſt modum gratioſè mitigavit, videlicet, conceſſit* 15°. *die Novemb. eodem anno* 22. *finiente incipiente* 23. *quòd omnes mercatores tam regni quàm aliundè, mercatoribus regni Franciæ duntaxat exceptis, lanas ſuas pelles lanatas et coria et alias mercandizas ad partes traducere poſſint, ita quòd regi de quolibet laſto tam lanæ fractæ quàm alterius, et etiam pellium lanatarum, tres marcas, de quolibet laſto coriorum ducendorum ad eaſdem partes quinque marcas perſolvant à viceſimo nono Julii* 22. *E.* 1. *et uſque Feſtum Sancti Michaelis tunc prox. ſequent. et ab eodem Feſto uſque Feſtum Natalis Domini anno* 25. *incipiente pro tempore. Rex amovit prædictum Johannem, viz.*

		£.	
Anno 23	-	6199	In that port of Hull.
Anno 24	-	4061	
Anno 25	- -	544	

Upon complaint of this impoſition, the ſtatute of 25. E. 1. called *Confirmationem Cartarum* was made; and by that ſtatute *cap.* 7. it is enacted, *E pur ceo que touts le pluis de communalty ſentent durament greve de le maltolt des leines, ceſtavoire de cheſcun ſack de leine quarrants ſoutz, et nous ont pryes que nous les voudremus releſer; nous a leur pryer les avouns pleniment releſſe, et nous avouns grant pur nous et pur nos heirs, que cele ne autre mes ne prendrons ſans lour comun aſſent et leur bone volunt, ſave a nous et a nos heirs la cuſtome de leynes pealx et quires avant grant per le cominalty avantdit. Teſt. &c.* 10 *Oct.*

Upon

Upon this act theſe things are obſervable:

1. That, notwithſtanding this impoſition was by conſent of the merchants, yet it being without conſent of parliament it was not legall, and the king himſelf ſtiles it no other than a maltolt. The like inſtances we ſhall after have 21. E. 3.

2. That there was by the act a ſpecial clauſe, that the like impoſitions in the future ſhould not be laid without conſent of parliament. And yet theſe inland commodities were ſo ready at hand to be charged upon emergent occaſions, that there were ſometimes the like illegall maltolts impoſed. Bnt upon complaint they were removed, and the like proviſion made againſt future charges of that nature without conſent in parliament. 15. E. 3. cap. 1.—Merchants ſhall have free paſſage for their woolls and other merchandizes, paying the cuſtomes of old time uſed. 27. E. 3. ſt. 2. cap. 1. & 2.

3. That the old ſubſidy of woolls, woollfells and leather, which before this new impoſition were at firſt granted to the king by parliament, as is before obſerved, [is ſaved *.]

The great cuſtome of woolls, woollfells and leather, which before this new impoſition of 22. E. 2. was called *Nova Cuſtuma*, now changed its appellation, and was after this called *Magna et Antiqua Cuſtuma.*

After this the old cuſtom, viz. for a ſack of wooll *demy marc*; *et pro* 300 *pellibus lanatis, quæ faciunt unum ſaccum, demy marc*; *et de laſto coriorum continente* 20 *dacres et quolibet dacre continente* 10 *coria, unam marcam,* was anſwered; and accordingly the account paſſed for the year ending 24 Nov. 26. E. 1. as appears by the accounts of the collectors of the cuſtomes, and that it ſtood untill 31. E. 1.

31. E. 1. the king granted to merchants-ſtrangers divers liberties and exemptions, as, namely, of priſage, murage, &c. And in conſideration thereof the merchants-ſtrangers granted to the king divers new cuſtomes, commonly called *Parva Cuſtuma*, viz.

Of every ton of wine imported by them two ſhillings, commonly called butlerage, becauſe it came in lieu of priſage.

Of every laſt of hides by them carried out of the kingdom, over and beſides the ancient cuſtome, demy mark; ſo that the whole cuſtome of an alien for a laſt of hides was 20s.

Of every ſack of wooll by them carried out of the realm forty pence, beſides the ancient cuſtome; ſo that the alien's whoſe cuſtome of a ſack of wooll was 10s.

Of every 300 woollfells the ſame cuſtome as upon a ſack of wooll.

* The two words between crotchets are added to ſupply a chaſm in the MS.—EDITOR.

Of

Of every cloth of ſcarlet dyed in grain and carried out, the ſum of 2*s.*

Of every cloth wherein there is part graine intermixed, exported, 1*s.* 6*d.*

Of every other cloth without graine, 12*d.*

Of all other things, viz. averdupoiſe, ſilks, horſes, cattle, and other merchandize exported or imported, three-pence for the value of every twenty ſhillings, within twenty days after their importation and unlading or ſale.

Of all merchandizes bought in the kingdom and exported, three-pence for the value of every twenty ſhillings *ultra cuſtumas prædictas regi aut aliis ante datas.*

Of every quintall of wax, 1*s.*

The tenor of the charter itſelf, becauſe it is the foundation of theſe aliens cuſtomes, I have inſerted, and is as followeth*:

Cart. 31. *E.* 1. *N°.* 44.

Pro mercatoribus alienigenis de libertatibus eis conceſſis.

Rex archiepiſcopis, &c. Salutem. Circa bonum ſtatum omnium mercatorum ſubſcriptorum regnorum terrarum et provinciarum, viz. Alemannie, Francie, Iſpanie, Portugalie, Navarre, Lumbardie, Tuſcie, Provincie, Cathalonie, Ducatus noſtri Acquitannie, Tholoſanne, Taturtinue, Flandrie, Brebantie, et omnium aliarum terrarum et locorum extraneorum quocunque nomine cenſeantur, venientium in regnum noſtrum Anglie et ibidem converſantium, nos precipuâ curâ ſolicitati, qualiter ſub noſtri dominio tranquillitatis et plene ſecuritatis immunitas eiſdem mercatoribus futuris temporibus preparetur; ut itaque vota ipſorum reddantur ad noſtra et regni noſtri ſervitia promptiora, ipſorum petitionibus favorabiliter annuentes, et pro ſtatu eorundem plenius aſſecurando in formâ que ſequitur ordinantes, ſubſcripta dictis mercatoribus pro nobis et hæredibus noſtris imperpetuum duximus concedenda, imprimis, videlicet, quòd omnes mercatores dictorum regnorum et terrarum ſalvò et ſecurè ſub tuitione et protectione noſtrâ in dictum regnum noſtrum Anglie, et ubique infra poteſtatem noſtram alibi, veniant cum mercandiſis ſuis quibuſcunque de muragio pontagio et pavagio liberi et quieti; quòd infra idem regnum et poteſtatem noſtram in civitatibus burgis et villis mercatoriis poſſint mercari duntaxat in groſſo, tam cum indigenis ſeu incolis ejuſdem regni et poteſtatis noſtræ predictæ, quàm cum alienigenis extraneis vel prenatis, ita tamen quòd merces, que vulgariter mercerie vocantur, ac ſpecies minutatim vendi poſſint, prout antea fieri conſuevit; et quòd omnes predicti mercatores mercandiſas ſuas, quas ipſos ad predictum regnum et poteſtatem noſtram adducere ſeu infra idem regnum et poteſtatem noſtram emere vel alias adquirere contigerit, poſſint quò voluerint, tam infra regnum et poteſta-

* I have had the following copy of *Carta Mercataria* examined with the record at the Tower.—EDITOR.

tem

tem noſtram predictam quàm extra, ducere ſeu portare facere, preterquam ad terras manifeſtorum et notoriorum hoſtium regni noſtri, ſolvendo conſuetudines quas debebunt (vinis duntaxat exceptis) que de eodem regno ſeu poteſtate noſtrâ, poſtquam infra idem regnum ſub poteſtatem noſtram ducta fuerint, ſine voluntate noſtrâ et licentiâ ſpeciali non liceat eis educere quoquomodo. Item quòd predicti mercatores, in civitatibus burgis et villis predictis, pro voluntate ſuâ hoſpitari valeant et morari cum bonis ſuis ad gratum ipſorum quorum fuerint hoſpitia ſive domus. Item, quòd quilibet contractus per ipſos mercatores, cum quibuſcunque perſonis undecunque fuerint, ſuper quocunque genere mercandiſæ initus, firmus ſit et ſtabilis, ita quòd neuter mercatorum ab illo contractu poſſit diſcedere vel reſilire, poſtquam denarius Dei inter principales perſonas contrahentes datus fuerit et receptus; et ſi forſan ſuper contractu hujuſmodi contentio oriatur, fiat inde probatio aut inquiſitio ſecundùm uſus et conſuetudines feriarum et villarum ubi dictum contractum fieri contigerit et iniri. Item promittimus prefatis mercatoribus, pro nobis et hæredibus noſtris inperpetuum concedentes, quòd nullam priſam vel arreſtationem ſeu dilationem occaſione priſæ de cetero de mercimoniis mercandiſis ſeu aliis bonis ſuis, per nos vel alium ſeu alios, pro aliquâ neceſſitate vel caſu, contra voluntatem ipſorum mercatorum aliquatenus faciemus aut fieri faciemus, niſi ſtatim ſoluto pretio pro quo ipſi mercatores aliis hujuſmodi mercimonia vendere poſſint, vel eis aliàs ſatisfactis, ita quòd reputent ſe contentos; et quòd ſuper mercimonia mercandiſas ſeu bona ipſorum per nos vel miniſtros noſtros nulla appreciacio aut eſtimacio imponetur. Item volumus, quòd omnes ballivi et miniſtri feriarum civitatum burgorum et villarum mercatoriarum mercatoribus antedictis conquerentibus coram eis celerem juſtitiam faciant, de die in diem ſine dilatione, ſecundùm legem mercatoriam, de univerſis et ſingulis que per eandem legem poterunt terminari; et ſi forte inveniatur defectus in aliquo ballivorum vel miniſtrorum predictorum, unde iidem mercatores vel eorum aliquis dilationis incommoda ſuſtinuerint, vel ſuſtinuerit, licèt mercator verſus partem in principali recuperaverit damna ſua nihilominus ballivus vel miniſter alius verſus nos prout delictum exigit puniatur, et punitionem iſtam concedimus in favorem mercatorum predictorum pro eorum juſtitiâ maturandâ. Item quòd in omnibus generibus placitorum (ſalvo caſu criminis pro quo infligenda ſit pena mortis) ubi mercator implacitatus fuerit vel alium implacitaverit, cujuſcunque conditionis idem implacitatus extiterit, extraneus vel prenatus, in nundinis civitatibus ſive burgis, ubi fuerit ſufficiens copia mercatorum predictarum terrarum et inquiſitio fieri debeat, ſit medietas inquiſitionis de eiſdem mercatoribus et medietas altera de aliis probis et legalibus hominibus loci illius ubi placitum aliud eſſe contigerit; et ſi de mercatoribus dictarum terrarum numerus non inveniatur ſufficiens, ponantur in inquiſitione illi qui idonei invenientur ibidem, et reſidui ſint de aliis bonis hominibus et idoneis de locis in quibus placitum illud erit. Item volumus ordinamus et

ſtatuimus,

ſtatuimus, quòd in quâlibet villâ mercatoriâ et feriâ regni noſtri predicti, et alibi infra poteſtatem noſtram pondus noſtrum incerto loco ponatur, et ante ponderationem ſtatera in preſentiâ emptoris et venditoris vacua videatur, et quòd brachia ſint equalia et extunc ponderator ponderet in equali, et cùm ſtateram poſuerit in equali ſtatim amoveat manus ſuas ita quòd remaneat in equali; quòdque per totum regnum et poteſtatem noſtram unum ſit pondus, et una menſura, et ſigno ſtandardi noſtri ſignentur; et quòd quilibet poſſit habere ſtateram unius quarteroni et infra, ubi contra dominum loci aut libertatem per nos ſeu anteceſſores noſtros conceſſam illud non fuerit, ſive contra villarum aut feriarum conſuetudinem hactenus obſervatam. Item volumus et concedimus, quòd aliquis certus homo fidelis et diſcretus London' reſidens aſſignetur juſticiariis mercatoribus memoratis, coram quo valeant, ſpecialiter placitare et debita ſua recuperare celeriter, ſi vicecomites et majores eis non facerent de die in diem celeris juſtitiæ complementum, et inde fiat commiſſio extra cartam preſentem conceſſa mercatoribus antedictis, ſcilicet de his quæ ſunt inter mercatores et mercatores ſecundùm legem mercatoriam deducenda. Item ordinamus et ſtatuimus, et ordinationem illam ſtatutumque pro nobis et heredibus noſtris imperpetuum volumus firmiter obſervari, quòd pro quâcumque libertate, quam nos vel heredes noſtri de ceterò concedemus, prefati mercatores ſupra ſcriptas libertates vel earum aliquam non amittant. Pro ſupradictis autem libertatibus et liberis conſuetudinibus obtinendis, et priſis noſtris remittendis eiſdem, ſepe dicti mercatores univerſi et ſinguli pro ſe et omnibus aliis de partibus ſuis nobis concorditer et unanimiter conceſſerunt, quòd de quolibet dolio vini quod adducent vel adduci facient infra regnum vel poteſtatem noſtram, et unde marinariis freitum ſolvere tenebuntur, ſolvent nobis et heredibus noſtris nomine cuſtumæ duos ſolidos ultra antiquas cuſtumas debitas et in denariis ſolvi conſuetas nobis aut aliis infra quadraginta dies poſtquam extra naves ad terram poſita fuerint dicta vina. Item de quolibet ſacco lanæ, quem dicti mercatores aut alii nomine ipſorum ement et de regno noſtro educent aut emi et educi facient, ſolvent quadraginta denarios de incremento ultra cuſtumam antiquam dimidiæ marcæ quæ prius fuerit perſoluta; et pro laſto corarum extra regnum et poteſtatem noſtram vehendorum dimidiam marcam ſupra id quod ex antiquâ cuſtumâ antea ſolvebatur; et ſimiliter de trecentis pellibus lanatis extra regnum et poteſtatem noſtram ducendis quadraginta denarios ultra certum illud quod de antiquâ cuſtumâ fuerat prius datum. Item duos ſolidos de quâlibet ſcarlatâ et panno tincto in grano. Item decem et octo denarios de quolibet panno in quo pars grani fuerit intermixta. Item duodecim denarios de quolibet panno alio ſine grano. Item duodecim denarios de quolibet ceræ quintallo. Cumq' de prefatis mercatoribus nonnulli eorum alias exerceant mercandiſas, ut de averio ponderis et de aliis rebus ſubtilibus, ſicut de pannis tarſeum, de ſerico, de cindalis, de ceto et aliis diverſis mercibus, et de equis, etiam ac aliis animalibus, blado et aliis rebus et mercandiſis multimodis,

que

quæ ad certam cuſtumam facile poni non poterunt, iidem mercatores conceſſerunt dare nobis et heredibus noſtris de quâlibet librâ argenti eſtimationis ſeu valoris rerum et mercandiſarum hujuſmodi, quocunque nomine cenſeantur; tres denarios; de librâ in introitu rerum et mercandiſarum ipſarum in regnum et poteſtatem noſtram predictam, infrà viginti dies poſtquam hujuſmodi res mercandiſe in regnum poteſtateni noſtram adductæ et etiam ibidem exoneratæ ſeu venditæ fuerint, et ſimiliter tres denarios de quâlibet librâ argenti in eductione quarumcunque rerum et mercandiſarum hujuſmodi emptarum in regno et poteſtate noſtræ predictis ultra cuſtumas antiquas nobis aut aliis ante datas; et ſuper valore et eſtimatione rerum et mercandiſarum hujuſmodi, de quibus tres denarii de quâlibet librâ argenti ſicut predicitur ſunt ſolvendi credatur eis per literas, quas de dominis aut ſocils ſuis oſtendere poterunt, et ſi literas non habeant ſtetur in hâc parte ipſorum mercatorum ſi preſentes fuerint, vel valectorum ſuorum in eorundem mercatorum abſentiâ, juramentis. Liceat inſuper ſociis de ſocietate mercatorum predictoruni infra regnum et poteſtatum noſtram predictam lanas vendere aliis: ſociis ſuis et ſimiliter emere ab eiſdem abſque cuſtumâ ſolvendâ; ità tamen quòd dictæ lanæ ad tales manus non deveniant, quòd cuſtumâ nobis debitâ defraudemur. Et preterea eſt ſciendum, quòd poſtquam ſepedicti mercatores ſemel in uno loco infra regnum et poteſtatem noſtram cuſtumam nobis conceſſam ſuperius pro mercandiſis ſuis in formâ ſolverint ſupradictâ et ſuum habeant inde warrantum, erunt liberi et quieti in omnibus aliis locis infra regnum et poteſtatem noſtram predictam de ſolutione cuſtumæ hujuſmodi pro eiſdem mercandiſis ſeu mercimoniis per idem warrantum, ſive hujuſmodi mercandiſæ infrà regnum et poteſtatem noſtram remaneant, ſive exterius deferantur, exceptis vinis que de regno et poteſtate noſtra predictis ſine voluntate et licentiâ noſtrâ ſicut predictum eſt nullatenus educantur. Volumus autem ac pro nobis et heredibus noſtris concedimus, quòd nulla exactio, priſa, vel preſtatio, aut aliquod aliud onus, ſuper perſonas mercatorum predictorum, mercandiſas ſeu bona eorundum, aliquatenus imponatur contra formam expreſſam ſuperius et conceſſam. Hiis teſtibus venerabilibus patribus Roberto Cantuar' archiepiſcopo totius Angl' Primate, Waltero Coventr' et Litchf' epiſcopo, Henrico de Lacy comite Lincoln', Humf' de Bohun comite Hereford et Eſſex ac Conſtabular' Angl', Adomaro de Valencia, Galfredo de Geynville, Hugone le Deſpencer, Waltero de Bello-Campo ſeneſcallo hoſpitii noſtri, Roberto de Bures, et aliis. Dat per manum noſtram apud Wyndeſor' primo die Februar'.

And I do not find that there were any cuſtoms anſwered between the 3. E. 1. and 31. E. 1 for goods imported either by aliens or ſubjects. * Thus it continued all the time of E. 1. and until the 5. E. 3. and then the lords ordeiners, being authorized by act of parliament with great power,

* Rot. Ordin'. 5. E. 2.

did

did annull this *Carta Mercatoria, viz. nous ordenioms, que touts manners de cuſtomes et maltouts, levyes puis le coroniement le roy Edward Fitz le roy Henry, ſoient entyrement ouſtees et de tote eſtincts pur tots jours, nent contreſteant le charter que le dit roy Edward fiſt al merchants aliens, purceo que el fuit fait countre le grand charter et encountre le franchis de la citie de Londres et ſans aſſent de Barnage, &c. ſauvant ne quident au roy les couſtomes de leyne peaux et quires, ceſt aſcavoire de cheſcun ſack de layne demy marke, et de 300 peaux lanus demy marke, et de laſt de quires un marke.**

Preſently upon this the collection of the petty cuſtomes of merchant-ſtrangers ceaſed, viz. from 9 *Octob.* 5. *E.* 2. and ſo they continued uncollected and unanſwered until the 20th July 16. E. 2. and from that time forward the petty cuſtoms by merchants. ſtrangers were anſwered; and this happened in this manner.

The king, Edward the ſecond, having gotten the better of the Earl of Lancaſter at his parliament, *à die Sancti Baptiſtæ in tres ſeptimanas* 15. *E.* 3. a repeal was made of theſe ordinances of 5. E. 2. as prejudicial to the rights of the crown, and that repeal commanded to be inrolled in the courts of Weſtminſter, *Trin.* 15. *E.* 2. *Rot.* 33.

And thereupon ſhortly after, viz. 20 July 16. E. 2. (for he began his reign the 7th of July) theſe petit cuſtomes began to be anſwered; and the warrant for the collecting of them is entered upon the cuſtomer's account for the year ending 17. E. 2. viz. in the foreign accounts *de tempore E.* 2. *Rot.* 54. for Newcaſtle, and alſo for Scarborough. And thus it continued anſwered all the time after; and in farther ſecurity of it, king E. 3. in the beginning of his reign, confirmed the *Carta Mercatoria* granted by king E. 1. and for the better ſecurity both of their privileges, and of the duties to be anſwered by them to the crown, they received at laſt an affirmation by the ſtatute of the ſtaple, 27. *E.* 3. *cap.* 1. *et* 26. and ſince that time it hath been conſtantly and unqueſtionably allowed.

What privileges and exemptions have been granted to the Hans merchants, viz. thoſe principally of Collen and Lubeck, and to the merchants of Almaine, and of the Stilyard, in reference to aliens duties, *vide Cart.* 18. *E.* 1. *m.* 18. *Cart.* 28. *E.* 1. *n.* 15. and what alteration or advance there have been in them, we ſhall deliver as they occur in their ſeveral ſeries of time.

In the mean time thus much ſhall ſuffice, touching the original and proceſs of the petty cuſtomes in the time of E. 1. with the interruptions and renewals of them in the times of E. 2. and E. 3.

And thus much alſo ſuffice touching the time of E. 1. Little elſe occurs of note concerning it, but only of ſome impoſitions upon wines and other petty matters, that vaniſhed, and ſcarce ſo much as came to account.

* See 1. Rot. Parl. 282.—EDITOR.

CAP. VIII.

Concerning cuſtomes, ſubſidies, and impoſitions in the time of Edward the ſecond.

THE reign of this king was troubleſome and tumultuous; he was much under the power of the nobility, eſpecially, from the fifth till the fifteenth of his reign; and there are but few memorials of his parliaments extant, whereby we may have any light touching theſe things. The moſt conſiderable buſineſs is that which is before remembered, viz. the great and petty cuſtomes; and little or nothing elſe, that I can obſerve, was anſwered from the firſt to the fifth year of his reign; both the great and petty cuſtome was accounted for from the fifth to the ſixteenth year of his reign; the petty cuſtomes of merchants-ſtrangers were ſuſpended by the ordinance of the lords ordeiners abovementioned; in the fifteenth year of his reign, theſe ordinances were repealed, and petty cuſtomes, and nothing elſe, that I can find, was anſwered from thenceforth during his reign.

CAP. IX.

The proceedings touching ſubſidies, cuſtomes, and impoſitions, during the reign of king Edward the third.

I COME to the time of king Edward the third, who was a gallant and a warlike prince, reigned long, and his time very full of great variety in relation to the cuſtomes and other duties, eſpecially relating to the ſea.

At the parliament held at York, which was *die Veneris ante feſtum Michaelis*, 5. *E.* 3. there was a ſubſidy of *demy marke* upon a ſack of wooll, *demy marke* upon three hundred woollfells, and twenty ſhillings upon every laſt of hides *ultra antiquam cuſtumam*, which was granted to the king for one year, to begin at the Purification following. But upon the parliament-roll of that year, no ſuch grant appears. In all probability, it was an ordinance by the king and the lords; and indeed ſo it is recited by the writ that repeals it. *Clauſ.* 7. *E.* 3. *m.* 7. *Licet nuper per nos magnates et proceres regni noſtri ordinatum extitiſſet, quòd mercatores indiginæ, &c. teſte* 30 *Junii*, 7. *E.* 3. But the king, by the advice

advice of this council, repeals that subsidy, and supersedes the commission for collecting it. The pretence was, that it would imbase the price of woolls: but it is also *necnon aliis de causis*. Possibly the people were not satisfied in the legality of the imposition. But yet afterwards, the arrears were levied and excused by necessity.

After this, to mend the matter, the merchants grant to the king upon his pressing occasion, ten shillings of every sack of wooll, ten shillings of every three hundred of woollfells, and twenty shillings of every last of hides exported by denizens or aliens, *ultra antiquas consuetudines* from the 14 *Maii* 7. *E.* 3. for one year. But in the parliament held 8. E. 3. complaint was made against this imposition as illegall and burthensome. And thereupon the king by the advice of his councill, by his writ bearing date 21 Sept. 8. E. 3. repeals that imposition, and supersedes the collection of it. *Claus.* 8. E. 3. *m.* 18.

By the stat. 11. *E.* 3. *cap.* 1. it is enacted, that none, under pain of death, shall export woolls out of the realm, till it be otherwise provided by the king and his councill.

This gave the king an opportunity to lay impositions, which could hardly be avoided; viz. he granted dispensations to persons to carry out wooll, paying what sums he pleased. And accordingly he took by this kind of imposition forty shillings upon every sack of wooll, the like upon three hundred woollfells, and three pounds upon every last of hides, of denizens, and near double as much of aliens, both in the twelfth and thirteenth years of his reign.

In 12. E. 3. the people complained and grew discontent with the imposition. And on the other side the king by his letters put the archbishop of Canterbury to make his excuse to the people in respect of his necessity. *Rot. Almaine*, 13. *E.* 3. *n.* 22.

But the king's necessities and great occasions increasing, and these illegal supplies coming very hardly from the people, a parliament is summoned, viz. 13. E. 3. at Westminster, where the commons grant the king in aid of his warr the tenth sheafe, fleece and lamb for the next year, to be paid in two years; but provision is made, *que le maltolt, que ore de novell est levy de lenes, soit outrement abatue et soit tenue vielle custume, et qu'ils eient per point de charter et enrollment de parlement, que mes ne soit levy tiel custome. Rot. Parl.* 13. *E.* 3. *n.* 5. *et ibidem, n.* 13. the petition is again renewed against the maltolt of woolls and an imposition upon lead *sans assent de la commune ou de graundz.*

Yet the king's necessities found a way to continue this imposition; and to give it the better countenance, it is taken upon a

kind of agreement between the king and the merchants for a free trade with woolls to Bruxelles, viz. forty ſhillings at the lading port, and forty ſhillings at Bruxelles, upon every ſack of wooll.

At the parliament held the Wedneſday after Midlent, *anno* 14. *E.* 3. *cap.* 21. the commons pray the king that there be an act paſſed that no more cuſtom be never taken of a ſack of wooll but ſix ſhillings and eight pence, nor of lead, tinn, leather nor woollfells but the ancient cuſtom. On the other ſide the king prays the lords and commons, that they would grant to him ſome aid upon woolls, leather woollfells and other merchandize. The lords and commons thereupon grant the king forty ſhillings on every ſack of wooll, forty ſhillings on every three hundred woollfells, and forty ſhillings of every laſt of leather and other merchandize that paſs beyond the ſea after that rate, to hold from Eaſter to Whitſuntide, and from thence for a year. And for this the king grants by conſent of parliament, that after that term expired he nor his heirs ſhall not demand, aſſeſs, nor take of Engliſhmen, of a ſack of wooll not above half a mark, and upon woollfells and leather the old cuſtom; the ſack to be twenty-ſix ſtone, and every ſtone fourteen pound. Obſerve upon this act:

1. This is the firſt grant that I find of any ſubſidy of merchandize exported other than woolls woollfells and leather; and this was a ſubſidy meaſured by the price of leather and woolls in nature of a poundage.

2. That now the ſack was reduced from twenty-eight ſtone to twenty-ſix; and proviſion was made, that for every ſack exported two marks of ſilver ſhould be brought to the exchange.

And now a man would think, that the old cuſtomes and no more ſhould without queſtion have continued without inhauncing. But it proved otherwiſe. The king's warrs and other occaſions increaſed, and put him upon means to ſupply his wants, notwithſtanding other large contributions by the people; and thereupon the merchants granted to the king a maltolt of forty ſhillings upon every ſack of wooll, beſides the old cuſtome: and though it ſeems this was done only by the lords and the merchants, yet, however it came to paſs, it was entered upon the parliament-roll 17. *E.* 3. *n.* 17. It is formally entered as a grant by the lords and commons, viz. *Et le dits grantz et communes ſe ſont aſſentus, que per tout cel temps noſtre ſegnior le roy prendra de cheſcun ſak de lene que paſſer* 40*s. de ſubſidie outſier l'ouncient cuſtome.* The time was till Michaelmas next and for three years after, during which time certain priſes were ſet upon the woolls of ſeveral countries, below which they

they ſhould not be ſold. Whereupon the ſame parliament N° 28 the commons pray,

Que le maltolt de leynes ſe teigne a demy marke, come en temps de ſes progenitours adœſte uſes, & per leſtatute puis en votre temps grauntees. Et coment que le merchants eint graunt per eux ſans aſſent des communes un ſubſidie de 40s. de cheſcun ſack de leyne, outre le droiturall, maltolt de demy marke, voillez s'il vous pleſt aver regard, que tut eſt en charge et miſchief de vos communes. Par quoi cel miſchief, ſi vous pleſt, ne voillez ſoeffrir, mes ſoit amendez à ceſt parliament, car c'eſt encontre reaſon, que le commune de lur biens ſoient per merchants charges.

The anſwer was,

L'entent de noſtre ſeignior le roy n'eſt pas de charger les communes per le ſubſidie que les merchants lui ont grantes, n'en poet eſtre entenduz en charge des communes, no'ement deſicome les communes ont touſiours un certeine priſe ſur les leynes permy les countees, le quel priſe le roi voet que eſtoiſe, et que de dedeins cel priſe nulles leynes ſoient achates, ſur forfeiture des meſmes les leynes in les muines les merchants que les iſſint achatent.

But yet it reſted not here. The king's warrs in France grew chargeable, and the former impoſition of 40s. complained of in 17. E. 3. ceaſing *Michaelmas* 23. E. 3. there was a new impoſition by the conſent of the merchants of 40s. per ſack ſet upon woolls, or rather continued for two years.

A parliament was held the Monday after Chriſtmas *anno* 20. *E.* 3. which was after the continuation of that tax; and *Rot. Parl.* 30. *E.* 3. *n.* 18. the commons petition againſt it, viz.

Item pry les commons, que le grand ſubſidie de 40s. al ſack de leyne ſoit ouſte, et l'auncient cuſtume pay, come autre foits ſeuſt aſſentu et graunte.

RESPONSIO. *Quant a ceſt point les prelates et autres, veants le neceſſity que le roy avoit d'eſtre aide, avant ſon paſſage per de la, pur recover ſes droitures et pur defender ſon realme d' Angletere, aſſenteront per accord des merchants, que noſtre ſeignour le roy avereit, en ayd de ſa dite guerre et pur defenſe de ſa dite terre, 40s. de cheſcun ſack de leyne que paſſer as parts ouſter mere pur deux auns prochiens a venir; et ſur meiſme le grant ount divers merchants fait pluſors chevances a noſtre dit ſeignour le roy en ayd de ſa dit guerre, per quoi tiel ſubſidie ne poit eſtre repelles ſans aſſent de roy et de ſes dits grauntz.*

The impoſitions upon woolls being great, the people began to reſume the manufacture of cloth, which had been long intermitted: and by this means the exportation of wooll began to be ſlack, and the people made cloth and exported it, upon which no cuſtom was as yet by law ſet.

Thereupon

Thereupon the king did ſet an impoſition upon cloth, viz. upon denizens fourteen pence for every cloth exported, and upon aliens one-and-twenty pence for every cloth, and ſome other cuſtoms upon woollen manufactures, wherein he kept ſome proportion to the rate of the great cuſtom upon woolls. *Vide Rot. Cuſtom.* 21. *E.* 3. *Rot Fin.* 24. *E.* 3. *m.* 19. *Jam magna pars lanæ regni panificatur, de quâ cuſtuma aliqua nobis non eſt ſoluta, &c.*

In the parliament of 21. E. 3. *inter bundellam petitionum* the commons complain of this impoſition.

Item pry la commune, que la ou ſes merchants ſoloient achater drapes et les ſoloient ameſner ouſter le mere, et auxi merchants-ſtraingers que ſoloient vener in Angletere pur achater drapes, et per reaſon de cuſtome ja de novell fait, ceſt aſcavoire de eheſcun drape 14*d.* *des merchants d' Angletere, et pur gents eſtrainges pur cheſcun drape* 21*d. iſſint que per reaſon de cel ſ[illegible]ivous cuſtome nul eſtrange merchant vient, et tote la commune de la terre des merchants et labourers impovere; de quou ils pry remedy, et que cele cuſtome ſoit auſtee. Item per drapes de worſted une novelle cuſtume, ſur cheſcun drape un denier, et de ſtrainges* 1*d. ob. et de cheſcun lyte* 10*d. et des ſtrainges* 15*d. a graunt damage du people labourers, et que cel cuſtome ſoit auſtee.*

RESPONSIO. *Il pleiſt au noſtre ſeignior le roy, as prelates countes et autres grauntz, que ceſte cuſtome eſtoyſe en ſa force, car il eſt auxi bien reaſon, qu'il preigne tiel profitt des drapes overees deins le royalme, et meſmes hors du royalme, come de laynes carryes hors de terre ſelonc l'affeirant des drapes overees de ſack.*

This petition and anſwer are not entered upon the parliament-roll, becauſe never aſſented unto by the lords. But they are upon the bundle of petitions of that year*.

So here we had theſe impoſitions which obtained the name of cuſtoms:

Of every woollen cloth,	
Of denizens	14*d.*
Of aliens	21*d.*
Of every cloth of worſted,	
Of denizens	1*d.*
Of aliens	1*d. ob.*
Of every bed,	
Of denizens	10*d.*
Of aliens	15*d.*

* They are accoodingly printed amongſt the petitions of the commons of 21. E. 3. in 2. Rot. Parl. 168. See No. 31.—EDITOR.

But

But theſe impoſitions were intended only of cloth without grain; but there was beſides this here mentioned a farther impoſition, viz.

1. Upon denizens	-	2*s.* 4*d.*
Upon aliens	-	3*s.* 1*d.* after 3*s.* 6*d.*
2. Upon half graine,		
Denizens	- -	21*d.*
Aliens	- -	2*s.* 1*d.*

Though it was at firſt by the king's commiſſion as an impoſition, yet it obtained in perpetuity.

1. Firſt, becauſe it carried a reaſon of equity, being laid upon the manufacture of woolls exported, and proportioned according to the rateable eſtimate of the cuſtom of a ſack of wooll.

2. Becauſe now it had a countenance by the conſent of the lords in parliament, who judged it reaſonable. And accordingly theſe cuſtoms upon oath continued in the times of all ſucceeding kings, though with ſome augmentations, as ſhall be ſhewn in due time.

And it did not only continue, but was extended proportionably to all new manufactures of woollen.

Rot. Parl. 15. *R.* 2. *n.* 43. This cuſtome was taken by the cuſtomers of kerſeys exported, and the merchants complain of it, and deſire it may be diſcharged.

The king's anſwer was, *Pur ce que le roye eſt inherittez per diſcent apres la mort de ſes progenitors de cuſtume de toutz maneres des draps faitz de leine en Angletere, et paſſants hors de realme, le roy voet, que touts ceux, que vorront paſſer aſcuns drapes, ſoient ils kerſeys ou autres, payont ent la cuſtome ſolonc les ordinances et ſtatuts ent faits.*

By the act of the 11. H. 4. c. 7. this duty is to be paid by aliens for cloth made into garments and by them exported proportionably.

Rot. Parl. 2. *H.* 5. *pars* 1. *n.* 39. it appears that this rateable cuſtome was taken of Corniſh and Devonſhire cloths called ſtreits, viz. for every four dozen of ſtreits fourteen pence of denizens, &c. They complain of the exceſſive proportion, and deſire it may be reduced to the rateable proportion of broad cloths, viz. for every dozen of ſtreits white or ruſſet one penny, for every dozen coloured two pence. But they prevailed not.

We ſhall ſee in this commiſſion following, a great improvement of this impoſition.

Anno

Anno 2do. Edwardi 4ti. Rot. 2.

Rex dilecto sibi Thomæ Barton salutem. Sciatis, QUOD CUM *mercatores extranei et alienigenæ, cum bonis et mercandisis suis, in regnum nostrum venientes, pro quibuscunque libertatibus et immunitatibus eis per dominum Edwardum nuper regem Angliæ progenitorem nostrum pro se et heredibus suis infra eundem regnum et potestatem nostram imperpetuum obtinendis, teneantur nobis solvere, pro mercandisis et rebus suis quibuscunque infra dictum regnum et potestatem nostram predictam adducendis et de eodem abducendis, ultra antiquas custumas nobis aut aliis inde debitas, prestationes et custumas subscriptas, viz. de quâlibet scarletâ de panno tincto in grano duos solidos; item 18d. de quolibet panno in quo pars grani fuerit intermixta; item 12d. de quolibet panno sine grano; item de quolibet quintallo cere 12d. item de averio ponderis et alia rebus subtilibus, sicut de pannis tarseum de serico et cindalis de ceta et aliis diversis aliis mercibus, de equis etiam et aliis animalibus bladis et aliis rebus, et mercandisis omnibus, que ad veram custumam de facili poni non possint, de quâlibet librâ argenti estimationis vel valoris rerum et mercandisarum hujusmodi, quocunque nomine censeantur, 3d. de librâ in introitu rerum et mercandisarum predictarum in regnum et potestatem nostram predictam infra viginti dies postquam hujusmodi res et mercandisæ in regnum et potestatem nostram predictam adductæ et ibidem exoneratæ seu venditæ fuerint, et similiter 3d. de quâlibet librâ argenti in eductione quarumcunque rerum et mercandisarum hujusmodi emptarum et in regno et potestate nostris predictis ultra custumas predictas nobis aut aliis antedatas; ita semper quòd super estimatione vel valore rerum et mercandisarum hujusmodi, de quibus 3d. de quâlibet librâ argenti, ut permittitur, sunt solvendi, credatur eis per litteras quas de dominis aut de sociis suis ostendere poterunt; et si litteras non habeant, stetur in hâc parte ipsorum mercatorum si presentes fuerint, vel vallettorum suorum in eorundem mercatorum absentiâ, juramentis, quòdque sæpe dicti mercatores, postquam semel in uno loco in regno et potestate nostris predictis custumam nobis superius concessam pro mercandisis suis in formâ solverint supradictâ, et suum habeant inde warrantum, liberi sint et quieti in omnibus aliis locis infra regnum et potestatem nostram de solutione hujusmodi custumæ pro eisdem mercandisis et mercimoniis per idem warrantum, sive hujusmodi res et mercandisæ in regnum et potestatem predictam remaneant, sive exterius deferantur.* Ac *in statuto, in parliamento Henrici quarti nuper de facto et non de jure regis Angliæ defuncti anno regni sui undecimo tento, edito,* * *inter cetera contineatur, quòd omnes hujusmodi mercatores alienigenæ extunc solvent custumam et subsidium pro vestibus factis et aptatis tam de pannis et scarletâ et sanguayne et aliis coloribus de integro grano*

* See xi. Hen. 4. c. 7. in the printed statutes.——EDITOR.

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vel de dimid. grano, ac etiam de pannis in grano tinctis, et omnibus aliis pannis lanis sciſſis extra dictum regnum noſtrum traducendis juxta ratam et quantitatem eorundem: ASSIGNAVIMUS *te ad ſubſidium predictum in portu villæ Gippivici, et in ſingulis portubus et locis eidem portui adjacentibus, tam ad eaſdem cuſtumas et ſubſidia pro hujuſmodi veſtibus ſic aptatis juxta formam ſtatuti predicti quàm ad predictas alias cuſtumas et preſtationes in portu et locis predictis, necnon ad cuſtumam pannorum de lanis in Angliâ factorum ad partes exteras ducendorum juxta ordinationem inde nuper factum, viz. quatuordecim denariorum de indigenis, et 21d. de alienigenis, de quolibet panno de aſſiſâ; 2s. 4d. de indigenis, et 3s. 6d. de alienigenis, de quolibet panno de ſcarletâ et alio panno de integro grano; et medietatem cujus cuſtumæ de quolibet alio panno de dimidio grano, in quo pondere grani fuerit intermixta; ac etiam ratam earundem cuſtumarum de quolibet alio panno ultra vel infra aſſiſam, prout major fuerit vel minor juxta portionem inde contingentem, necnon 1d. de indigenis, et 1d. ob. de alienigenis, et de uno panno de integro worſted 5d. de indigenis, et 7d. ob. de alienigenis; et de uno panno et uno lecto ſimplici de worſted 9d. de indigenis, et 13d. ob. de alienigenis, pro uno lecto duplicato; in portu et locis predictis quàmdiu nobis placuerit, in propriâ perſonâ tuâ, et non per ſubſtitutum, levand' et colligend' et ad opus noſtrum recipiend'; et ad ſigillum noſtrum quod dicitur cocquet in portu predict' cuſtodiend' nobis reſpondeantur ad ſcaccarium noſtrum; et ideo tibi precipimus, quòd circa premiſſa diligenter intendas, et ea facias et exequaris in formâ predictâ, in cujus rei, &c. Teſte rege apud Weſtm' 28o. die Aprilis anno regni noſtri ſecundo.*

Conſimil' aſſignatio fact' eidem Thomæ Barton ubi mercatores Hanſe mencionant' dat' die et anno ſupradictis, Rot. 3tio.

Conſimil' aſſignatio fact' Johanni Talbott 10 die Aprilis anno primo Edwardi quarti, Rot. 3to et 4to.

When we come down to queen Mary's time, we ſhall ſee, how this was improved yet farther.

But thus this cuſtom upon cloth was anſwered down to the time of queen Mary. *Vide* Cooke *Magna Carta, cap.* 30. *p.* 60. for the legality of this impoſition upon cloth. Now how this ſhould be anſwered by aliens, grew to be a great queſtion; for they were charged by the *Carta Mercatoria* for three-pence per pound, and for twelve-pence for every cloth without grain.

Theſe things were therefore reſolved:

1. That the three-pence *per libram* chargeable by *Carta Mercatoria* did not extend to theſe goods exported or imported by them, which were charged by that charter with another duty as wines and cloths.

2. That for pieces of cloths, that were not cloths nor half cloths, merchants aliens ſhould not be charged with the ratea-

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ble proportion of twelve-pence, or one-and-twenty-pence for a cloth, but for that they ſhould pay only their poundage of three-pence *per libram*, in reſpect of a clauſe in the charter of the merchants aliens that favoured that conſtruction, and alſo by reaſon of uſage.

3. That although there were formerly by *Carta Mercatoria* an impoſition of twelve-pence upon every cloth *ſine grano*, and now here was one-and-twenty-pence impoſed upon ſuch a cloth, the Hanſe merchants ſhould not be charged with both; but paying there one-and-twenty-pence, which was the greater proportion, they ſhould be diſcharged of the twelve-pence. All this appears by *Clauſ.* 41. *E.* 3. *m.* 17. *pro mercatoribus extraneis et Communia in ſcaccario P.* 35. *E.* 3. *Rot. London' pro Johanne de la Panetry et Willielmo Clompton collector. bus parvæ cuſtumæ London'.*

4. But for other merchants aliens, they did not only anſwer the duty by *Carta Mercatoria*, but alſo the impoſition of one-and-twenty-pence, &c. upon cloths.

This cuſtome of cloth was conceived ſo much the ſame with that of woolls, which was ſettled by the third of Edward the firſt, and ſo intirely due in proportion by virtue of that grant, that it aſſumed the name, viz. the cocquet, and paſſed by that warrant. And whereas the ſmall cuſtomes themſelves, due by *Carta Mercatoria*, if concealed, did not induce a forfeiture of the goods themſelves, becauſe there was no act of parliament that gave that forfeiture in that caſe; yet for cloth uncuſtomed the very goods themſelves were forfeited, as well as in caſe of woolls: becauſe this cuſtom was conceived due by law upon the ſame account as the cuſtom of wools. *Communia in ſcaccario, M.* 6. *H.* 4. *Rot.* 20.

But now to return where I left off,—we have ſeen the ſtate of impoſitions, and their remiſſions and continuations, until the 21. E. 3. and by the way we have met with this impoſition upon cloth.

We have ſeen that the merchant's charge of forty ſhillings for every ſack of wooll was rivetted upon the people from Michaelmas the 20. E. 3. for two years, which ended Michaelmas 22. E. 3.

But during the continuance thereof, there was a farther charge impoſed for convoy of merchants, viz. upon every ſack of wooll two ſhillings, upon every tunn of wine two ſhillings, and upon every twenty ſhillings of goods imported ſix-pence. The commons complain thereof *Rot. Parl.* 21. *E.* 3. *n.* 11. But all that they could obtain was, that only two ſhillings per ſack ſhould be taken for that purpoſe, till Eaſter next. *Vide ibidem, n.* 58.

They again, in the ſame parliament petition for the removing of the former impoſition upon woolls, viz. forty ſhillings

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per ſack, and that wools may paſs at the ancient cuſtom, *Rot. Parl.* 21. *E.* 3. *n.* 29. but they could not get it off.

Another parliament is ſummoned, and held the morrow after Midlent, 22. E. 3. The commons were yet under the impoſition for woolls until Michaelmas following; and *Rot. Parl.* 22. *E.* 3. *n.* 8. they pray, *que le paſſage des leynes et autres mercandiſes ſoient overts ſans faire appreſts outer la cuſtome, &c.* The anſwer is, *ſoit le paſſage overt, que chefcun paſſe franchment ſavant au roy ceo que lui eſt due.* He ſtill kept the former maltot till the time of its expiration.

After the expiration of that impoſition, which ended at Michaelmas, 22. E. 3. the merchants are again drawn to yield to a new impoſition of forty ſhillings for every ſack of wool; which impoſition continuing, a parliament is ſummoned and held in the octaves of the Purification, 25. E. 3. As in that parliament. *Rot. Parl.* 25. *E.* 3. *n.* 22. the commons grant a ſubſidy of forty ſhillings upon every ſack of wool, and upon every laſt of leather, to continue for two years from Michaelmas next: but withall petition, that the impoſition of the merchants might be diſcharged. The king accepts their grant, but continues the former impoſition till the new began, excuſing the ſame by his great neceſſities and occaſions.

A new parliament ſummoned and held *die Lunæ prox. poſt feſtum Sancti Mathei*, 27. *E.* 3. The former ſubſidy of woolls, woollfells and leather is continued from that Michaelmas for three years.

At that parliament the ordinances for the ſtaple were ſettled, and thereby * *cap.* 1. the old cuſtom of woolls, woollfells and leather declared, and a new ſubſidy of aliens in perpetuity of three-pence upon every ſow of lead ſettled.

The ſubſidy of alnage was ſettled in the precedent parliament, viz. that of proviſors, † *cap.* 4. whereof in due time.

A parliament is ſummoned and held *Craſtino Martini*, 29. *E.* 3. The former ſubſidy of woolls, woollfells and leather is continued for ſix years. *Rot. Parl.* 29. *E.* 3. *n.* 35.

A parliament is ſummoned and held 15 *Michaelis*, 26. *E.* 3. and a ſubſidy is granted to the king of 20s. upon every ſack of wooll, 20s. upon every 300 woollfeells, and 40s. of every laſt of leather, over the ancient cuſtome, to hold for three years from Michaelmas laſt. *Rot. Parl.* 36. *E.* 3. *n.* 35. But *ibidem*, *n.* 26. there is this additional proviſion by act of parliament, viz. *Que aprés le dit terme riens ne ſoit priſe ne demaund, forſque l'auncient cuſtome de demy marke, ne que ceſt grant ore fait, ne que*

* 27. E. 3. ſt. 2.—EDITOR. † 27. E. 3. ſt. 1.—EDITOR.

ad

ad eſt fait devant ces heures, ne ſoit trete en example ne charge de common en temps avener : et que merchants denizens puiſſent paſſer ove lour leynes ſi avant come les forrens ſans eſtre reſtraine ; et que nul ſubſidie, ne autre charge, ſoit miſe, ne grant, ſur les leynes per les merchants, ne per nul autre deſore en avaunt ſans aſſent du parliament.

At the parliament held 8*vis. Hill.* 38. *E.* 3. viz. *Rot. Parl. n.* 9. the commons grant to the king a ſubſidy of 40s. of every ſack of wooll, 40s. of every three hundred woollfells, and four pounds of every laſt of leather, exported, over and above the ancient cuſtome, to hold from the feaſt of Purification untill Michaelmas following, and from thence for three years.

And *ibidem, n.* 24. 25. the ſtaple removed into England, and all new fees and impoſitions for the ſtaple repealed, and likewiſe 40d. per ſack taken at the ſtaple at Calais, and all other unreaſonable impoſitions, repealed. And *ibidem, n.* 26. the forfeiture of ſhips for goods uncuſtomed without privity of the owner removed.

At the parliament ſummoned and held the firſt of May 42. E. 3. viz. *Rot. Parl.* 42. *E.* 3. *n.* 9. a new ſubſidy is granted of woolls and leather exported, from Michaelmas following for two years; viz. of every ſack of wooll 36s. 8d. of every two hundred and forty woollfells 36s. 8d. of every laſt of leather four pounds, over and beſides the antient cuſtom of half a marke for every ſack of wooll and two hundred and forty woollfells, and a marke for every laſt of leather.

And hereby it appears, that ſince the laſt parliament the proportion of 300 woollfells anſwering a ſack of wooll was reduced to 240 woollfells, and an equal cuſtome and ſubſidy charged upon them with a ſack of wooll; and accordingly that proportion held always after. Poſſibly, upon an exacter eſtimate than was formerly taken, they found, that 240 woollfells did countervaile a ſack; and therefore the cuſtom of a ſack was charged upon 240 woollfells afterwards, and not upon 300, as was done till after the 38. E. 3. as appears by comparing *Rot. Parl.* 38. *E.* 3. *n.* 9. with 42. *E.* 3. *n.* 10.

Another parliament is held 8*vis. Trin.* 43. *E.* 3. and when as yet there was above a year to come of the former ſubſidy, the former ſubſidy is enlarged in time and value; viz. 43s. 4d. of every ſack of wooll, as much of every two hundred and forty woollfells, and 4l. of every laſt of hides, *outre l'auncient cuſtome de demy mark de cheſcun ſack de wooll de denizens*, 10*s. d'aliens*; *demy mark de cheſcun* 240 *woollfells de denizens, et* 10*s. d'aliens*; *et un mark de cheſcun laſt de quires de denizens, et* 20*s. d'aliens*, for three years from Michaelmas next.

In the parliament 45. E. 3. there was no new ſubſidy of woolls or leather granted, for the former had continuance. But, *ibi-*

dem,

dem, n. 42.—*priont les commons, que null impoſition ou charge ſoit miſe ſur les leynes pealx lanutes ou quires, ouſter le cuſtome et ſubſidie grants au roy, nul part ſans oſſent de parliament.*

RESPONSIO. *Le roy le voet; et ſi nul ſoit miſe puys le ſtatute, ſoit repelle.*

In the parliament held *Craſtino Animarum*, 46. *E.* 3. *viz. Rot. Parl. n.* 10. there is granted a new ſubſidie of woolls and leather exported for two years from Michaelmas next; viz. of denizens 43s. 4d. of every ſack of wooll, 43s. 4d. of every two hundred and forty woollfells, and four pound of every laſt of leather, over the ancient cuſtome; and of aliens, of every ſack of wooll 10s. of every two hundred and forty woollfeels four marks, and of every laſt of hides eight marks, beſides a 15*me.* granted.

But beſides this, after the cloſe of the parliament, and when the knights of the counties were diſmiſſed, the burgeſſes and citizens were called before the prince and ſome of the biſhops and lords, and there ventured to grant for one year a kind of ſubſidy of tunnage and poundage; viz. two ſhillings upon every tun of wine imported, and ſixpence of every twenty ſhillings of merchandize imported or exported*. This was taken formerly by the like compoſition with the merchants. But it was the firſt time; that I can find, that it came ſo near to a parliamentary conſent, though it were but a lame buſineſs.

A new parliament is held *Craſtino Edmundi Regis*, 47. *E.* 3. at which parliament, *n.* 12. a fifteenth was granted for two years, and a ſubſidy of tonnage and poundage for two years; viz. 6d. *per libram* of all merchandizes imported and exported, except woolls woollfells leather and wines; and two ſhillings per tunn of wines, viz. the firſt year abſolutely, the ſecond year upon condition if the war continued; and alſo they granted the great ſubſidy of woolls.

Although the like tunnage and poundage was taken by way of capitulation with the merchants almoſt ever ſince the 21. E. 3. as appears by the complaints thereof in parliament of 21. and 25. E. 3. and after the end of the laſt parliament by capitulation with the burgeſſes; yet this was the firſt time it was ſettled by parliament.

Indeed by the ſtatute of 14. E. 3. c. 21. abovementioned, ſomewhat like a poundage was granted; and by the *Carta Mercatoria* a poundage, viz. of 3d. *per libram* and two ſhillings per ton, was granted by aliens. But this was the firſt regular ſettled ſubſidy of tunnage and poundage, charging denizens as well as aliens, as I obſerve.

The next parliament is held, as I obſerve, *die Lunæ poſt feſtum Sancti Georgii*, 50. *E.* 3. At this parliament, *Rot.*

* This ſingular grant by the citizens and burgeſſes without the knights of the ſhire is in the printed rolls of parliament, v. 2. p. 310. n. 15.—EDITOR.

Parl.

Parl. n. 9. the great ſubſidy of woolls woollfells and leather granted 46. *E.* 3. *n.* 10. continued from Michaelmas next for three years; but no new grant of the ſubſidy of tunnage and poundage, and the commons excuſe it by reaſon of their poverty.

From the 27th year of this king until ſome time before the 50th of his reign, merchants were not much troubled with impoſitions by bare impoſition, though there were ſome paid by capitulation, eſpecially upon ſtaple commodities; partly becauſe there were ſtrict proviſions from time to time made againſt them; but principally becauſe parliaments all along gave the king liberall ſupplies for his warrs. I do not remember any thing in that intervall, but only the tunnage of wines taken for the convoy of merchants, taken purely by impoſition.

But the king began now to grow old; and there were buſie inſtruments about the 49th year of this king's reign, that put the king upon new impoſitions, viz. for every ſack of wooll tranſported to any place but Calais 11s. 4d. upon the exchange of every twenty ſhillings, &c. for which Richard Lyons and the lord Latimer, the inſtruments thereof, were puniſhed in parliament, viz. *Rot. Parl.* 50. *E.* 3. *n.* 17. 24.

And in that parliament petitions were againſt new impoſitions, both ſuch as were ſett by the king and by officers; viz. for chalking, meſonage, God's-penny, cocquett, tronage, *Rot. Parl.* 50. *E.* 3. *n.* 163. and that they that were inſtrumental to ſett new impoſitions without act of parliament might ſuffer death; but this was too ſevere, and prevailed not. *Ibidem, n.* 191.

At the parliament held the 15me. *Hill.* 51. *E.* 3. I find not any ſubſidy granted upon merchandize; for the former was continuing.

In this parliament, *n.* 25. the houſes among other things petition, *que en temps avener vos prelates, countes, barons, commans, citizens et burgeſſes de votre realme, ne ſoint deſore charges, moleſtes, ne greves, de common ayde faire au charge ſuſtiner, s'il ne ſoit per common aſſent des prelates, dukes, countes, barons, et autres gents de common du dit realme, et ceo en plein parliament; ne nul impoſition miſe ſur les leynes, peaux launtes, quires, ſi non l'auntient cuſtome, ceſt aſcavoire, de ſack de leyne demy marke, de trays cent peaux launtes demy marke, de laſt de quire un marke de cuſtome, tantſoulement, ſolonc le ſtatute fait in l'an votre raigne* 14me. *ſavant vous le ſubſidie a vous grante tanquee a certaine temps limitt a darrein parliament, et rient levez à ore.* As to this part of the petition the anſwer is, *quant a ceo que charge ne fuiſſe mys ſur le people ſans common aſſent, le roy n'eſt my en volentee de ce faire ſans graund neceſſity, et pur le de defence du realme, et la on il le purra faire per reaſon; et quant a ceo que im-*

poſitions

poſitions ne ſoient miſes ſur les leynes ſans aſſent de prelates, dukes, countes, barons, et autres gents de la commune de ſon realme, il y ad eſtatut ent fait, quele roy voet qu'il eſtoyſe enſa ſource.

But this was never drawn up into an act; and therefore the practice of taking of a demy marke upon 240 woollfells continued, according as it had been practiſed for ten years before, notwithſtanding the ſtatute 14. E. 3.

And thus much ſhall ſerve touching the cuſtoms of goods imported and exported.

The things remarkable in the long and glorious reign of king Edward the third in reference to theſe port duties are principally theſe:

(1.) He ſettled the *Carta Mercatoria*, whereby the petty cuſtoms were granted; and this he did, not only by his charter of confirmation, but alſo procured it to be ſettled by act of parliament, 27. E. 3.

(2.) He ſettled the ſtaple of woolls and other ſtaple commodities by act of parliament, viz. 27. E. 3. ſt. 2.

(3.) About the 39th year of his reign he reduced the cuſtom of a demy marke for 300 woollfells to be paid upon 240 woollfells.

(4.) He ſettled by parliament in perpetuity the ſubſidy of alnage 27. E. 3.

(5.) In his time the firſt ſubſidy of tunnage and poundage was granted.

(6.) He eſtabliſhed a perpetual cuſtom of 3d. upon every ſow of lead.

(7.) He did firſt ſett up the cuſtom of cloth exported, viz. 14d. upon every cloth of denizens, and one-and-twenty pence upon every cloth of aliens; and this was ſettled upon this ground, viz. that upon ſo much wooll as would make ſuch a cloth had it been exported by denizens undraped, it would have yielded fourteen pence for cuſtome, and if exported by aliens undraped it would have yielded one-and-twenty pence, viz. a third part more.—Thus it ſtood upon ſuch an equality of reaſon, that though it were originally ſett by way of impoſition, yet it hath always continued ever ſince, but with ſuch advances, as ſhall be ſhewn; for though about a fourth or thereabout of a ſack of wooll made a cloth, yet fourteen-pence, which was near the ſixth part of the cuſtome of a ſack of wooll, was the duty impoſed upon it. And therefore it ſeems, that ſir Edward Cooke in the comment upon the 36th chapter of *Magna Carta* bears ſomewhat too hard againſt the legality of this duty upon cloth, for that the duty upon clothes was never impoſed by an authority of parliament, but by the king and his councill, as hath been ſhewn, as within the equity of the cuſtome of woolls. And that reaſon, that he gives, viz. that the alnage was given

to

to the king by the ſtatute 27. E. 3. in lieu of his loſs by the draping and exporting of cloth, is moſt certainly miſtaken. For—1. That is a duty ſett by parliament in relation to clothes not exported, but expoſed to ſale in the kingdom.—2. And plainly *de facto* the truth was, that this impoſition of fourteen-pence and one-and-twenty pence of clothes exported was ſett in compenſation of that loſs, above five years before the ſettling of the ſubſidy of alnage; and the very commiſſion, that ſetts it, expreſſeth the reaſon, *qui magna pars lanæ pannificatur.* And ſo the great cuſtome of wooll was not anſwered for the clothes ſo exported till this proviſion made of charging the cloth *pro ratâ*, which as I ſaid was not by an act of parliament, as is ſuppoſed by the book and Dy. 165. but by an act of the king and his councill, as hath been ſhewn.* It was indeed complained of in parliament, and prayed to be repealed, and denied by the king and the lords, but not enacted in parliament that I could ever find.

And hence it was that in all the grants of the ſubſidy of tunnage and poundage from Edward the fourth's time downwards, clothes, as well as wooll woollfells and leather, was excepted out of the poundage. And the reaſon was, becauſe it anſwered the cuſtom of 12d. and 21d. And though in the acts of tunnage and poundage precedent to the time of E. 4. there be no exception of woollen clothes out of the ſubſidy of poundage, but only an exception of woolls woollfells and leather, yet in all probability they were diſcharged of poundage by writ of privy ſeal, as well as the Hans merchants aliens were diſcharged of paying their 12d. per cloth of theſe clothes after the 21d. was ſett upon them, as appears by the record above cited of *P.* 35. *E.* 3. I will ſett in the tenor of the writt there entered *.

† *Edwardus Dei gratiâ, &c. Theſaurario et baronibus de ſcaccario ſalutem. Cùm nuper ad proſecutionem diverſorum mercatorum de partibus Almanniæ ipſos nobis ſuggerentium, ipſos, de quolibet panno de lanâ in partibus tranſmarinis facto et per ipſos intra regnum noſtrum adducendo, cuſtumas ſubſcriptas, juxta formam cartæ eiſdem mercatoribus per dominum Edwardum quondam regem Angliæ avum noſtrum conceſſæ, et per nos confirmatæ, ſolvere conſueviſſe, viz. de quolibet panno in grano duos ſolidos, et de quolibet panno mixto cum grano decem et octò denar' ac de quolibet panno ſine grano* 12*d. et poſt modum pro eo quòd lanæ infra regnum noſtrum creſcentes, et de quibus, ſi extra idem regnum noſtrum ad partes exteras traductæ fuiſſent,*

* Ante p. 170.—EDITOR.

† The copy of the following writ as in lord Hale's MS. I found to want many words. But through the favour of Mr. Chapman the copy here given is corrected from the record in the office of the Treaſurer's Remembrancer at the Exchequer; namely, from the *Communia Scaccaria* of 53. E. 3.—EDITOR.

cuſtuma

cuſtuma et ſubſidium nobis ſolvi debuiſſent, in non modicâ quantitate pannorum infra idem regnum operatæ et panni hujuſmodi ad partes exteras educti fuerunt, per nos et concilium noſtrum ordinatum fuiſſet, quòd de ſingulis hujuſmodi pannis infra regnum noſtrum factis et extra idem regnum noſtrum educendis 21d. per mercatores extraneos loco cuſtumæ et ſubſidii prædictorum ad opus noſtrum ſolventur; præfatoſque mercatores dictam cuſtumam 21d. pro quolibet panno infra idem regnum noſtrum facto et per ipſos ad partes exteras traducendo; juxta ordinationem dicti concilii noſtri ad opus noſtrum ſolvere paratos fuiſſe; ac collectores cuſtumæ pannorum de lanâ infra regnum noſtrum factorum et extra idem regnum educendorum in portu London' ipſos mercatores pro cuſtumâ 12d. de ſingulis pannis per ipſos ad partes exteras educendis ultra dictam cuſtumam 21d. diſtrinxiſſe; in ipſorum mercatorum damnum non modicum et depreſſionem manifeſtam; et nobis ſupplicantium ſibi per eos remedium adhiberi, ac nos, advertentes non eſſe juſtum aut conſonum rationi, quòd præfati mercatores de duplici cuſtumâ pro unâ et eâdem re ſolvendâ onerentur; præfatis collectoribus mandavimus, quòd, receptâ à prædictis mercatoribus pro quolibet hujuſmodi panno per ipſos extra idem regnum noſtrum educendo dictâ cuſtumâ 21d. demaundæ; quas eiſdem mercatoribus pro dictâ cuſtumâ 21d. pro hujuſmodi panno ad opus noſtrum ſolvend' facerent, ſuperſederentur omnino; with a command to the barons to allow it to the collectors upon their accompt *teſte 7 Febrii*. 35. *E.* 3.

But although this privilege ſeems to be general as to all merchants of Almaine, yet it was only enjoyed by the Hans merchants in after time, as will appear hereafter; for other merchants-alien paid both the 12d. and the 21d.

In queen Mary's time the ſubſidy of wooll granted to her was 33s. 4d. over and above the old cuſtom, which amounted to 6s. 8d. in all to 40s. of denizens. It was then obſerved, that 14d. for the cuſtome of every ſhort cloth did not countervaile the cuſtom and ſubſidy of wooll; for it was then found, that four ſhort broad clothes would be made only of a ſack of wooll, and four times 14d. would amount only to 4s. 8d. whereas to ballance the ſubſidy and cuſtom of wooll, each cloth ſhould have born ten ſhillings. It was thereupon thought fit to increaſe the cuſtom of cloth, to make it bear ſome nearer proportion to the cuſtome and ſubſidy of wooll and yet for the encouragement of the manufacture. Wherefore, by decree of the lords of the council annexed to the book of rates, *Rot. Parl.* 4. *et* 5. *P. et M. parte* 3 *dorſo*, and being under ſeal in the long houſe at Weſtminſter, there was ſet upon every ſhort cloth of denizens exported 6s. 8d. ſo that brought up the duty of four cloths, which would take up a ſack

of wooll to 26s. 8d. and upon every ſhort cloth of aliens exported ten ſhillings.

This duty continued to be paid all the time of queen Mary and queen Elizabeth and king James, and ever ſince, though not without ſome diſpute, as appears 1. Eliz. Dy. 165.

About the middle of king James, when the cuſtom and ſubſidy of woolls amounted together to forty ſhillings upon the ſack upon denizens, as formerly in queen Mary's time, it was found there wanted a mark in the duty upon ſhort cloths to make the duty anſwer the cuſtom and ſubſidy of a ſack of wooll, viz. forty ſhillings; and thereupon that mark was ſett upon four cloths, viz. three ſhillings and four-pence upon every cloth of denizens more than was in queen Mary's time; and that mark upon four cloths was called the pretermitted cuſtomes, and accordingly it was taken in king James his time, and not without great diſtaſte.

The ſubſidies falling by the death of king James, no new ſubſidies of woolls or tunnage were granted in king Charles his time: but it was taken by way of impoſition till about 16th of Charles, and then taken by the powers of the times, and from the 16th of Charles the pretermitted cuſtom of cloth was omitted, and the cuſtom of cloth anſwered according to queen Mary's conſtitution, viz. 6s. 8d. a cloth of denizens, and ten ſhillings of aliens. But upon the laſt ſettlement of the ſubſidy of tunnage and poundage granted to the king for his life, and by the book of rules then enacted, viz. 12. Car. 2. the duty of ſhort cloths of denizens was reduced to 3s. 4d. the cloth, and that of aliens to 6s. 8d. viz. double the denizens; and ſo it ſtands ſettled by act of parliament. And a ſhort cloth is 28 yards in length, weighing ſixty-four pounds. If it exceed, it pays *pro ratâ*, viz. two farthings half farthing a pound weight, and abating after that rate in cloths that are ſhorter. *Vide* Book of Rates, page 227.

And thus we have the long narrative of the cuſtomes and ſubſidies during the long reign of king E. 3. and alſo the narrative of the progreſs of the cuſtoms of cloth; which, though conſiſting of diverſ intervals and variations, I thought good to put here together.

CAP.

CAP. X.

The ſtate of the ſubſidies, cuſtoms and impoſitions during the reign of Richard 2.

KING Edward the third began his reign the 25th of January 1623. He died the 20th of June, in the 51ſt year of his reign, and his grand-child Richard the ſecond ſucceeded him.

At the entry of R. 2. into his reign the cuſtoms and ſubſidies of goods exported and imported thus ſtood:

1. The great cuſtom of woolls, woollfells, and leather, ſettled 3. E. 1. deſcended to him *jure hereditario.*

2. The petty cuſtomes of merchants-ſtrangers ſettled by *Carta Mercatoria* deſcended to him *jure hereditario.*

3. The cuſtomes of cloth and worſteds began and ſettled 21. E. 3. deſcended unto him alſo *jure hereditario.*

4. The cuſtome of three-pence on a ſow of lead, ſettled by the 27. E. 3. deſcended unto him alſo *jure hereditario*, as alſo the ſubſidy of alnage ſettled by 27. E. 3.

5. Beſides all this, the great ſubſidy of wooll, woollfells, and leather, granted for three years 50. E. 3. had a continuance for two years to come at Michaelmas, after the beginning of his reign.

In the firſt year therefore of his reign, though there were diſmes and fifteenths granted, there was no ſubſidy of merchandize. But it appears by *Rot. Parl.* 2. *R.* 2. *pars* 1. *n.* 13. (which was held 15*me. Paſchæ*) that at a parliament of Glouceſter there had been granted one mark upon a ſack of wooll, and 6d. poundage upon other merchandize; and that is there releaſed, and the old ſubſidy of woolls and leather is continued for one year from Michaelmas following.

A new parliament ſummoned and held 20 October 2. R. 2. The great ſubſidy granted 50. E. 3. ceaſed at Michaelmas before; and *Rot. Parl.* 2. *R.* 2. *part.* 1. *n.* 29, 30. there is granted 43s. 4d. of every ſack of wooll exported, 43s. 4d. of every ſack of wooll exported, 43s. 4d. of every 240 woollfells exported, 4l. 6s. of every laſt of hides exported, to be paid by denizens and ſtrangers, beſides the old cuſtom, for three years from Michaelmas next. There is alſo granted the ſame duties to be paid until Eaſter following. So they made a chaſm or interval between Eaſter and Michaelmas following, that that it might not grow to be a conſtant duty. They alſo farther

granted 13s. 4d. upon every ſack of wooll, 13s. 4d. upon every 240 woollfells, and 26s. 8d. upon every laſt of hides, beſides the old cuſtomes and the ſubſidies abovementioned, to hold for one year from Eaſter next. They alſo granted 6d. for every 20s. of all merchandizes exported or imported, as well of foreigners as denizens, from the 16th of November till the 15th Michaelmas following.

Nota, hitherto no penalty impoſed upon non-payment of theſe ſubſidies. The remedy for them was only by ſeizure or diſtreſs, not forfeiture of the goods, or by information in the exchequer for the duty in *ſpecie*.

At the parliament held Hill. 3. R. 2. viz. in *Parl. Rot. n.* 17. the former ſubſidies are all continued from Michaelmas next for one year.

At the parliament held 5 Nov. 4. R. 2. *Rot. Parl. ibidem, n.* 15, 16. the ſubſidy of woolls, woollfells, and leather, continued till Chriſtmas, and thence to the feaſt of Saint Martin following.

At the parliament held *Craſtino Animarum*, 5. R. 2. viz. *n.* 40. the ſubſidy of woolls, woollfells, and leather, continued from the Feaſt of the Circumciſion till Candlemas, and a chaſm or interpoſition of time [illegible] of ſubſidy left purpoſely, leſt by the continuation of the ſame the king might claim it in time as his right.

At the parliament held after in the ſame year two ſhillings *per* ton and ſixpence *per libram* granted from Michaelmas next, for two years, ſtat. 5. R. 2. c. 4.

At the parliament held 26 *Octobris*, 7. *R.* 2. viz. *ibidem, pars* 1. *n.* 35. the ſubſidy of two ſhillings upon every ton of wine, and 6d. upon the pound granted untill Michaelmas next, with expreſs proviſion, that it be paid out to the admirall for the guard of the ſeas and conduct of merchants between Michaelmas Mount and the Tweed. And *vide ibidem, n.* 36. a complaint of the neglect of that guard; and *ibidem, n.* 35. an impoſition of 19d. upon a ſack of wooll beyond the cuſtom and ſubſidy, and diſcharged as to denizens.

The ſubſidy of woolls was continued till the feaſt of Saint John Baptiſt, 9. R. 2. although the continuance thereof ſeems not to be at all expreſſed upon the rolls of 7. and 8. R. 2. But at the parliament *die Veneris poſt feſtum Sancti Lucæ*, 9. *R.* 2. *Rot. Parl. n.* 11. proviſion is made, that it ceaſe *uſque feſtum Sancti Petri ad vincula tunc prox' ſequens, ad effectum, ne ſubſidium hujuſmodi, quod ex liberâ et ſpontaneâ conceſſione dominorum et communitatis procedit, ſi forte continuaretur abſque interruptione, de jure vel conſuetudine vindicari valeat vel clamari*; and the ſubſidy of woolls and woollfells, viz. 42s. 4d. *ultra*

antiquam

antiquam cuſtumam de denizens et 46*s.* 1*d. de aliens*, and of woolls and woollfells in like proportion, continued from St. Peter *ad vincula* for one year.

At the parliament held 1ſt October, 10. R. 2. viz. *n.* 18. a ſubſidy of 3s. of every ton of wine, and 12d. for every twenty ſhillings of merchandize exported or imported, except woolls, woollfells, leather and wines, as well of foreigners as ſubjects, notwithſtanding any exemption to them granted. The ſubſidy alſo of woolls, woollfells and leather is continued from the feaſt of St. Peter *ad vincula* to the feaſt of St. Edmond, and thence to the 1ſt of January then next, if no parliament be held in the mean time.—This is the firſt time that the cuſtom of poundage was raiſed from ſix-pence to twelve-pence.

Rot. Parl. 11. *R.* 2. *n.* 16. a grant of a ſubſidy of 43s. 4d. of every ſack of wooll and every 240 woollfells of denizens, and aliens 46s. 8d. above the ancient cuſtom, from the 23d of May laſt to the 24th of June, and thence for a year; and the former ſubſidy of tunnage and poundage continued for the ſame time.

At the parliament held Monday *poſt feſtum Sancti Hill. anno* 13. *R.* 2. viz. *n.* 20. there is granted from the firſt of March until the firſt of January, of every ſack of wooll and of 240 woollfells of denizens 33s. 4d. of aliens 36s. 8d. beyond the ancient cuſtom; and of every laſt of hides five marks of denizens, and five marks and a half of aliens, beſides the ancient cuſtom; and three ſhillings for every tun of wine imported, and 12d. poundage of all merchandizes imported and exported, except woolls, woollfells, leather, and except victualls, clothes and harneſs, brought to Berwick, Roxborough, and Geddeſworth, for their furniture; the rates of poundage to be as it coſt the merchant at the firſt buying.—*Nota:* no book of rates then, and this the firſt direction, how the goods ſhould be valued.

At the parliament held *Craſtino Martini*, 14. *R.* 2. viz. *n.* 16. there is granted for three years from the feaſt of St. Andrew laſt paſt, of every ſack of wooll and every 240 woollfells 43s. 4d. of denizens, and 46s. 8d. of aliens, beſides the ancient cuſtom; and of every laſt of hides ſix marks 6s. 8d. of denizens, and ſeven marks of aliens, beſides the ancient cuſtomes; and three ſhillings of every tun of wine imported, and 12d. per pound of all merchandize exported or imported, as well of denizens as of ſtrangers, notwithſtanding any privilege.

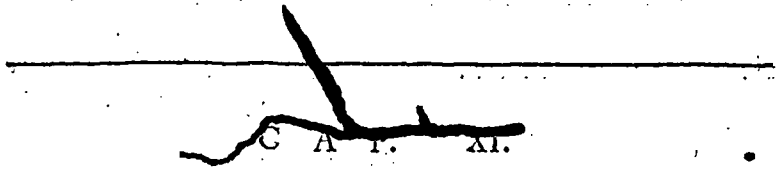
At the parliament held *Octavis Hill.* 16. *R.* 2. *Rot. Parl. n.* 11. the ſame ſubſidies of wooll, woollfells, leather, tunnage and poundage continued for three years from the feaſt of St. Andrew next.

At

At the parliament held Monday in the feaſt of St. Vincent, 20. R. 2. viz. *Rot. Parl. n.* 18 the ſubſidy of tunnage and poundage continued from the feaſt of St. Andrew 20. R. 2. for three years, and the ſubſidy of woolls, woollfells and leather continued from the ſaid feaſt for five years.

Theſe are all the ſubſidies of goods imported or exported that I can obſerve in the reign of this king. As to the cuſtom he continued them as he found them left by his grandfather, without any conſiderable alterations or impoſitions. Only there grew up in his time, a certain tax for woolls, woollfells and leather exported, called the devoires of Bolyes, which was 8d. upon a ſack of wooll, and 16d. upon a laſt of hides; and this was alſo transferred upon cloth upon the reaſon beforementioned, and was paid rateably for all clothes and worſteds. Alſo only by a ſpecial proviſion by act of parliament, *Rot. Parl.* 16. R. 2. *n.* 42. ſingle kerſeys were diſcharged of that duty; for ſo it became now, being for a long time quietly paid.

And thus much for the time of Richard the ſecond.



Concerning the ſtate of the cuſtomes, ſubſidies and impoſts of goods exported and imported in the time of H. 4.

RICHARD the ſecond having reigned two-and-twenty years, three months and fifteen days, was depoſed, and Henry the fourth uſurped the crown before the expiration of the period of the ſubſidies abovementioned granted the 20. R. 2. viz. 30th Sept.

There was a ſubſidy of woolls, woollfells and leather granted in his firſt parliament for three years from Michaelmas laſt, viz. of denizens 50s. of aliens 60, upon a ſack of wooll.

But in his ſecond parliament, begun 20 January 2. H. 4. viz. *ibidem, n.* 9. there was granted to him two ſhillings of every tun of wine, and eight-pence in the pound of every manner of merchandize imported or exported, except corn, flour, fiſh, and rees, &c. from Eaſter next for two years, and a penalty of double cuſtom upon the merchant making default of payment.—This was the firſt penalty that I find annexed to the non-payment of the ſubſidies of this kind.

His next parliament was held the laſt of September, 4. H. 4. At that parliament, *Rot. Parl. n.* 28. there is granted for three years from

from Michaelmas laſt, of every ſack of wooll and every 240 woollfells 50s. of denizens, 60s. of aliens; of every laſt of hides 5l. of denizens, and 5l. 6s. 8d. of ſtrangers.

Nota: it is not ſaid in the grant *ultra antiquas cuſtumas*.

There is likewiſe granted from the third of April following to Michaelmas next, and from thence for two years, three ſhillings of every tun of wine imported, except the king's priſage, and twelve-pence for poundage of goods imported, except woolls, woollfells, leather, corn, bear, &c. and that the merchants making default of payment, that they forfeit the moiety of their merchandizes without other damage.

Here the former penalty is altered.

At the parliament 6 October 6. H. 4. viz. *n.* 9. there is granted, among other ſubſidies, for two years from Michaelmas next, of every ſack of wooll and every 240 woollfells 43s. 4d. of denizens, and 53s. 4d. of aliens; of every laſt of hides 5l. of denizens, and 5l. 6s. 8d. of aliens. The ſame tunnage and poundage as in the former grant, with the ſame exceptions, but the penalty of concealment omitted.

At the parliament held the 22d December 8. H. 4. viz. *n.* 9. there is granted the former ſubſidy of woolls, woollfells, and leather, from Michaelmas next for one year, and likewiſe the ſame ſubſidy of tunnage and poundage for the ſame term, but no penalty upon the merchant making default of payment. And there is a large capitulation between the king and the merchants, that they ſhall guard the ſeas for that ſubſidy of tonnage and poundage. And *ibidem*, *n.* 50. there is mention made of a concurrent grant of the like ſubſidy of tonnage and poundage, charging aliens, except the Hans merchants, granted in a parliament held 7. H. 4.

At the ſame parliament held 20th October 9. H. 4. viz. *n.* 26. the ſame ſubſidy of woolls, woollfells, and leather, and tonnage and poundage, with the exception as before and of beſtaile, is granted for two years from Michaelmas next.

At the parliament held the 15*me*. *Hill.* 11. *H.* 4. * there is granted for two years from Michaelmas next, the ſame ſubſidy of tonnage and poundage, with the ſame exceptions, and of denizens 43s. 4d. upon a ſack of wooll, and 43s. 4d. upon 240 woollfells, and 5l. upon a laſt of hides exported; and of aliens 50s. of a ſack of wooll, 50s. of 240 woollfells, and 5l. 6s. 8d. of a laſt of hides.

At his parliament held *Craſtino Animarum*, 13. *H.* 4. *ibidem*, *n.* 10, there is granted for one year from Michaelmas next, of denizens for every ſack of wooll, and of every 240 woollfells 43s. 4d. of every laſt of hides 5l. of aliens of every ſack of

* 3. *Rot. Parl.* page 635. *n.* 45.—EDITOR.

wooll

wooll 53s. 4d. of every 240 woollfells 53s. 4d. of every laſt of hides 5l. 6s. 8d. And alſo there is granted, 3s. a tunn of all wines exported or imported, and 12d. per pound of all merchandize imported or exported, except as before. *Quære* for the time ?*

And thus ends the ſubſidies of H. 4. in whoſe time I find no complaint of any impoſition ſet on merchandizes; and it concerned him to be juſt to the people.—In theſe ſubſidies upon woolls, woollfells, and leather, it is not ſaid *ultra antiquas cuſtumas.*

CAP. XII.

Concerning the cuſtomes and ſubſidies of merchandiſes in the time of H. 5.

KING Henry the fourth having reigned thirteen years, ſix months and four days, dyed 20 *Martii* 1412. Henry the fifth his ſon ſucceeded him, and ſummoned and held a parliament which began [illegible] in *Rot. Parl. n.* 17. there is granted for four years from Michaelmas next, of denizens 43s. 4d. of every ſack of wooll and of every 240 woollfells, and 5l. of every laſt of hides; of aliens 50s. for every ſack of wooll and every 240 woollfells, and 5l. 6s. 8d. of every laſt of hides exported. *Nota:* it is not ſaid *ultra antiquas cuſtumas.* There is likewiſe granted until Michaelmas next, and for one year next after, 3s. upon every tun of wine imported or exported, except priſage of wine; and 12d. per pound of goods exported or imported, except woolls, woollfells, leather, corn, flour, fiſh, rees, beſtaile, imported, and except ale exported for victualling of Calais, &c. The rate of poundage to be according as it coſt the merchant, and that their oaths and letters be credited therein. Defaulters in payment to pay double ſubſidy without forfeiture of goods.

At the ſame parliament of Hen. 5. the commons, in hopes of being diſcharged from ſuch ſubſidies and tonnage and poundage for the time to come, further granted a whole tenth and a whole fifteenth†.

* It appears by the printed roll of parliament, that the grant of the commons limits a time for the ſubſidy of woolls, but is ſilent as to the duration of the duty on wine and poundage on merchandize; and thence grows Lord Hale's queſtion. 3. *Rot. Parl.* 638.—EDITOR.

† This paragraph I have partly ſupplied from the printed roll of parliament, the paſſage in Lord Hale's manuſcript being here imperfect.—EDITOR.

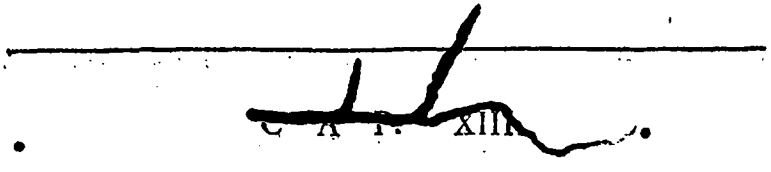
But

But at the next parliament held *ultimo Aprilis*, 2. *H.* 5. viz. *n.* 7. the former ſubſidy of tonnage and poundage continued from Michaelmas next for three years in the ſame manner as the laſt grant was.

At the parliament held *die Lunæ prox' poſt feſtum Omnium Sanctorum anno* 3. *H.* 5. viz. *pars* 2. there is granted to the king from Michaelmas next for his life, of denizens 43s. 4d. upon every ſack of wooll and every 240 woollfells, and 5l. of every laſt of hides exported; of aliens 60s. upon every ſack of wooll and every 240 woollfells, and 5l. 6s. 4d. of every laſt of hides exported; and likewiſe the ſubſidy of tonnage and poundage, with the ſame exceptions and remedy as before, with a proviſo not to be drawn in example.—This is the firſt time theſe ſubſidies were granted for life.

And now for the enſuing time of this king I find no more grants of ſubſidies upon merchandize; but his ſupplies were for the future by tenths and fifteenths, as there was occaſion.

I find no complaint of any impoſitions in this king's time.



Concerning the cuſtomes and ſubſidies of merchandize in the time of Henry 6.

HENRY the fifth dying 31 Auguſt 1422, his ſon Henry 6. an infant, ſucceeded him.

His firſt parliament was held *die Lunæ ante feſtum Sancti Martini*, 1. *H.* 6.

At that parliament, viz. *n.* 19. there is granted of all goods ſhipped from the firſt of September, and ſo forward for two years after the commencement of the parliament, of denizens 33s. 4d. of every ſack of wooll and every 240 woollfells, to be paid by moieties at the end of ſix months after the date of the cocquett; of aliens 53s. 4d. of every ſack of wooll and of every 240 woollfells; and likewiſe the ſubſidy of tonnage and poundage according to the former proportions, but nothing of leather. Proviſion, that if woolls ſhipped by Engliſh be loſt at the ſea, the cuſtom ſhould be diſcharged; or, if paid, to ſhip out as much cuſtom free.

At the parliament held 20 October, 2. H. 6. viz. *n.* 14. there is granted the laſt day of that parliament, (viz. the 28 Feb. and ſo mentioned upon the roll) for two years from Saint Martin's day next,

next, the like ſubſidy of wooll and woollfells of merchants Engliſh as before, and of aliens 43s. 4d. of every ſack of wooll and 240 woollfells to be ſhipped within that time, and the like ſubſidy of tunnage and poundage.

At the parliament held *ultimo Aprilis*, 3. *H.* 6. viz. *n.* 17. the ſubſidy of woolls for merchants Engliſh, and alſo the tunnage and poundage of merchants Engliſh, continued from the feaſt of Saint Martin 1426 for three years, under the like proviſions for loſſes and forfeitures of double cuſtome, as before. Merchants-ſtrangers excuſed, becauſe they were to be put under hooſt within fifteen days after their coming, and to ſell all their merchandize within forty days after their coming under hooſt.

At the preſent parliament 18 Feb. 4. H. 6. viz. *n.* 24. there is granted from Saint Martin's day 1429 for two years, of Engliſh 33s. 4d. of every ſack of wooll and every 240 woollfells, of aliens for the like 43s. 4d. and the ſubſidy of three ſhillings per tunn and twelve-pence for every twenty ſhillings of aliens for the two years aforeſaid, and of denizens from St. Martin's next for one year, with the like proviſions for loſſes, and an exception of wooll and woollfells and all manner of woollen cloth out of the ſubſidy of poundage.—And here came firſt in the exception of woollen cloth out of the ſubſidy of poundage, becauſe charged, as we have ſhewn, with another cuſtome impoſed; and it was always after this exception continued; for though probably it paid not poundage before, yet this exception is put in to make it clear.

And the parliament *in quindena Michaelis*, 6. *H.* 6. viz. *n.* 13. the ſubſidy of tunnage and poundage of merchants-denizens granted for one year from the feaſt of Saint Ambroſe next.

At the parliament held 22 Sept. 8. H. 6. there is granted, from the feaſt of St. Michael to the next parliament, three ſhillings of every tunn of wine imported, and twelve-pence for every twenty ſhillings of other merchandize imported or exported by denizens, except woolls or woollfells hides, and wheat *.

At the parliament held *die Veneris ante feſtum Hillarii*, 9. *H.* 6. viz. *n.* 14. there is granted until the feaſt of Saint Martin, and from thence for a year, of every tun of wine imported three ſhillings, and of every tun of ſweet wine imported by aliens three ſhillings more; and twelve-pence for every twenty ſhillings value of goods imported or exported by denizens, and ſix-pence more of aliens; and from the feaſt of Saint Martin 1434 for

* Rot. Parl. vol. 4. p. 337.—EDITOR.

one

one year five nobles upon every ſack of wooll.—Proviſion for goods taken by enemies or periſhed at ſea.

At the parliament held 12 May, 10. H. 6. the ſame ſubſidies of woolls, tunnage and poundage continued for one year from the feaſt of Saint Martin 1434*.

At the parliament held 8 July, 11. H. 6. viz. *n.* 21. there is granted, of all woollen cloth of any denizen exported in any carrick from the feaſt of the Conception to the feaſt of Hillary; and for woollen cloth of denizens exported, from the feaſt of Hillary to the feaſt of Saint Martin's, twelve-pence of every twenty ſhillings value; of all merchandizes exported or imported by denizens, from the feaſt of Saint Martin next for two years, twelve-pence for every twenty ſhillings, except woolls woollfells, wine, freſh fiſh, &c. of every ton of wine exported or imported of every denizen and alien three ſhillings; and of every tun of ſweet wine imported by aliens, from the feaſt of Saint Martin for three years, three ſhillings over the rate of tunnage before granted; and of every ſack of wooll of aliens exported during that time 53s. 4d.—This is the firſt ſubſidy granted of cloth that I find except alnage.

At the parliament held 10 Oct. 14 H. 6. viz. *n.* 14. there was a grant of five nobles of denizens ſeven nobles of aliens, for a ſack of wooll until the feaſt of Saint Martin 1437; of every tun of ſweet wines 6s. of other wines 3s. impoſed by merchants-aliens, from the feaſt of Saint Martin 1437 for a year; 12d. for every 20s. of merchandizes imported by aliens, from the feaſt of Saint Martin 1436 for a year.

At the parliament held the 21 Jan. 15. H. 6. viz. *n.* 29. there is granted for three years, from the feaſt of Saint Martin next, for every ſack of wooll or 240 woollfells exported by denizens 33s. by aliens 53s. 4d. three ſhillings per tun of all wines, and ſix ſhillings per tun of aliens importing ſweet wines, for three years from the firſt of April; and 12d. for every 20s. of other merchandize, except woolls and woollfells, and except woollen cloth of denizens.

At the parliament *Craſtino Martini*, 18. *H.* 6. viz. *n.* 13. the former ſubſidies continued for three years longer.

At the parliament *in die Converſionis Pauli*, 20. *H.* 6. viz. *n.* 6. *et ſequentibus*, the former ſubſidies continued for two years; woollen cloth of denizens excepted out of the poundage; and the value of the merchandize to be rated by the oath of the merchant or his factor's letters.

* Rot. Parl. vol. 1. p. 369 — Editor.

At

At the parliament held 5 Feb. 23. H. 6. viz. *n.* 16. the former ſubſidies continued for four years.

At the parliament held 12 Feb. 27. H. 6. viz. *n.* 9. there was granted for five years 12d. for merchandize imported or exported by denizens or aliens, (the Hanſe merchants not excepted) except woollen cloth of denizens, &c. and three ſhillings per tun of wines imported by denizens or aliens charged moreover, and three ſhillings more per tun for ſweet wines imported by aliens, and the Hanſe merchants charged as well as others. *Et ibidem, n.* 15. a ſubſidy of thirteen ſhillings and four-pence of every ſack of wooll of Cumberland and Weſtmoreland exported, and 33s. 4d. of other woolls, for four years from the feaſt of Saint Martin next: a forfeiture of the woolls ſhipped uncuſtomed; and proviſion for diſcharges in caſe of loſſes at ſea.

At the parliament held *6 Martii* 31. *H.* 6. viz. *n.* 8. there is granted to the king for his life from the third of April 1454.

1. Poundage of denizens ſtrangers and Almaines, viz. 12d. for every 20s. value; but for tynne ſtrangers to pay two ſhillings, the valuation as it coſt at the firſt buying, the oath and letters of the merchant to conclude; except wooll, woollfells, hides, wine, and except corn, flour, freſh fiſh and beſtayl imported, and victuals exported for Calais.

2. Tunnage, viz. three ſhillings a tun of wine imported by alien denizen or Hanſe, and three ſhillings more for ſweet wines imported by aliens. Penalty of concealers double cuſtoms.

3. Of denizens 43s. 4d. for every ſack of wooll or 240 woollfells, and 5l. for a laſt of hides.

4. Of aliens 5l. of every ſack of wooll or 240 woollfells, and 5l. 6s. 8d. for a laſt of hides.

This is the higheſt ſubſidy upon aliens for woolls; and the Hanſe merchants, notwithſtanding their priviſege, were included.

In *Rot. Parl.* 33. *H.* 6. *n.* 71. the commons found themſelves pinched with this act, principally in two things, viz.

1. That the ſubſidy of woolls was too high upon denizens, viz. higher by ten ſhillings than it had been in this king's time.

2. That there was no exception of Engliſh woollen cloth out of the ſubſidy of poundage, which was a great diſcouragement to the manufacture.

Thereupon

Thereupon the king diſcharged the Engliſh of ten ſhillings, part of their ſubſidy of woolls exported to the ſtaple of Calais or Straights of Morocco, for five years; and that every merchant denizen be diſcharged of the poundage of woollen clothes by them exported by the ſpace of five years.

And this brings theſe duties to the end of this king's reign; in all whoſe reign I find no complaint of any impoſitions laid here in England. But ſome are complained of, which were laid in France or Acquitaine in his foreign dominions; as namely, *Rot. Parl.* 8. *H.* 6. *n.* 29. of 12d. *per libram* ſet by H. 5. for relief of Burdeaux, which is there repealed; *Rot. Par.* 15. *H.* 6. of 4d. *per lib.* for the relief of Bayon, continued *Rot. Parl.* 23. *H.* 6. *n.* 45. *&c.* againſt taxes in Acquitaine upon wines; 28. *H.* 6. *Rot. Parl. n.* 51. the like; and *ibidem, n.* 54. ſome exertions made by ſearchers and water-bailiffs, which are there remedied by act of parliament.

And thus we have done with the reign of king Henry the ſixth. And being beaten by king Edward the fourth, he loſt his crown 3 *Martii* 1460, when he had reigned thirty-eight years, ſix months and three days; and Edward earl of March, the right heir to the crown, took upon him the government. The progreſs of cuſtomes and ſubſidies in his time, and in the time of ſome of his ſucceſſors, will be the buſineſs of the next chapter.

CAP. XIV.

Concerning the cuſtomes and ſubſidies of merchandize in the times of E. 4. and R. 3. H. 7. H. 8. and E. 6.

AT the parliament held 4 Nov. 1. E. 4. there was no ſubſidy granted, as I can find; but the buſineſs of the parliament was to ſettle the kingdom upon the late great revolution. And yet it appears by the rolls of 1. 2. and 3. E. 4. that theſe ſubſidies were anſwered. It may be there might be ſome grant, though it appears not upon the parliament roll of 1. E. 4.

But in the parliament held 20 April 3. E. 4. a ſubſidy of tunnage and poundage was granted to the king during his life; viz.

Three ſhillings of every tun of wine imported, and three ſhillings more of every tun of ſweet wine imported by merchants aliens, as well thoſe of the Hanſe as others.

Twelve-

Twelve-pence for every twenty ſhillings of all merchandizes exported or imported by ſubjects or aliens, except tynne.

Two ſhillings for every twenty ſhillings value of tynne of merchants ſtrangers, and twelve-pence of denizens.

Except out of the ſubſidy of poundage, woolls, woollfells and leather exported, and except corn, flour and all woollen cloth made hereby Engliſh, all freſh fiſh, beſtayl, and wine.

The value to be rated by the merchants oath or their factors letters as they coſt at the firſt buying.

I cannot yet find the act itſelf; but it is recited in the ſtatute of 12. E. 4. c. 3. whereby proviſion is made, that, whereas by the act of 3. E. 4. the penalty of concealing of cuſtomes is only payment of double cuſtomes, now the penalty is the forfeiture of the merchandize inward expoſed to ſale before ſubſidy paid, and of the merchandize outward if ſhipped the cuſtom not paid or collector agreed with.

Yet in all the intervall between the beginning of E. 4. till this grant the duty was received, poſſibly by way of mandate or impoſition.

As to the time of R. 3. I do not remember any grant of this ſubſidy, yet I think it was granted to him for his life 1. R. 3.— He raiſed his revenues upon woolls and woollfells by licences to tranſport them to other places beſides Calais 1. H. 7. 4.

Neither have I ſeen any grant thereof in the times of H. 7. or H. 8. though it be certain there were grants thereof made to theſe princes in the firſt years of their reigns. This appears fully as to the time of H. 8. by the ſtatute of 6. H. 8. cap. 14. whereby the ſtatute 12. E. 4. is continued in force during the king's life.

As to the time of E. 6. he began his reign 28 January 1547. His firſt parliament was held 4 November 1. E. 6.

By the ſtatute 1. E. 6. cap. 13. the former ſubſidy of tonnage, with the addition of 12d. upon every tun of Rheniſh wine, and the ſame ſubſidy of poundage, with an addition of 12d. for tynn, and with the ſame exceptions of woolls, woollen cloth, &c. as before, and alſo 33s. upon every ſack of wooll or 240 woollfells, and and 3l. 6s. 8d. upon every laſt of hides exported by denizens, and 3l. 6s. 8. of every ſack of wooll or 240 woollfells, and 3l. 13d. 4d. of every laſt of hides exported by aliens, are granted to the king for his life from the firſt day of his reign. A forfeiture of merchandize, where the cuſtom concealed; but the penalty to take place from the firſt *Martii* next. Proviſion for merchandize loſt, and a proviſion for the Hans merchants of the Stillyard.

And thus much ſhall ſerve for the narrative of theſe kings time.

CAP.

CAP. XV.

Concerning ſubſidies, cuſtomes and impoſitions upon merchandize in the times of queen Mary, queen Elizabeth, and king James.

I COME to the time of queen Mary. She began her reign 5th July 1553. By the ſtatute of 1. Mary, ſeſſion 2. cap. 18. which began by prorogation 24 *Octobris*, the ſubſidy of woolls, woollfells and leather, with tunnage and poundage, is granted to her for her life, from the firſt day of her reign, viz.

Tonnage:

Of every tunn of wine coming into the realm by way of merchandize, three ſhillings, and ſo after that rate.

Of every tunn of ſweet wines coming in *ut ſupra* by merchants aliens, as well of Hans as others, the farther ſum of three ſhillings; and ſo after that rate over and above the 3s. afore granted.

Of every tunn of Rheniſh wine imported 12d.

Poundage:

Of every twenty ſhillings value of merchandize imported or exported by way of merchandize 12d.

Of every twenty ſhillings value of tynne exported by merchants aliens 12d. more.

Woolls, &c. viz.

Of every ſack or 240 woollfells of denizens born 33s. 4d. of aliens though made denizens 3l. 6s. 8d.

Of every laſt of hides of denizens born 3l. 6s. 8d. of aliens born 3l. 13s. 4d. and ſo after that rate.

Merchandizes imported after the firſt of January next and laid on land, or goods to be exported laid on ſhipboard after that time, the ſubſidy not paid or collector agreed with, all forfeited. Proviſion for goods periſhing at ſea after cuſtome paid to reſhip the like quantity free from ſubſidy. Engliſhmen ſhipping any goods in a carrick or galley to pay aliens cuſtomes.

Some things are ſeaſonable to be obſerved on this act, which will be relative to all the ſubſidies of this nature that follow, and to thoſe that go before as to ſome purpoſes, viz.

1. Although the cuſtom of woolls, &c. be not ſaid *ultra cuſtumas antiquas*, but generally, yet it is ſo intended, and was ſo practiſed; for cuſtome and ſubſidy came to 40s. of denizens, as will appear by the impoſition hereafter ſet upon cloth, which appears

to

to have been rated upon a ſuppoſition that both the ſubſidy and cuſtome of woolls were due.

2. Merchants aliens made denizens rated to the ſubſidy as aliens, which is but purſuant to former laws.

3. The Hanſe merchants pay their ſubſidies as other aliens, notwithſtanding their privileges; which though in ſome former acts they are ſaved, yet here and in ſome others they are derogated.

4. The commencing of the duty outwards by exportation, inwards by importation, by way of merchandize.

5. The penalty or remedy: a forfeiture of goods exported if ſhipped, of goods imported if landed or unſhipped to be laid on land, the cuſtome not paid or collector agreed with.

Theſe and many other obſervables touching theſe kinds of duties will be more particularly obſerved.

6. The eſtimate of the rate of merchandize not left to the merchants oath or advices, but generally.—And the reaſon was, becauſe at the time of this ſubſidy granted, it was in deſign and proſpect to ſet a public eſtimate or book of rates of merchandizes, according to which they were to pay poundage; which was accordingly done, being the firſt time of the making of a book of rates; according to which rates poundage was paid all the time of queen Mary and queen Elizabeth, and until 2. James, as appears by the recital of the letters under the privy ſignet of king James 26 November, 2. James, for the ſetting of a new book of rates. This book of queen Mary was delivered into the exchequer under the great ſeal and ſign manuall, to be the rule of thoſe payments, where it ſtill lodgeth. If any merchandizes were omitted out of the book of rates, as many were, they paid poundage *ad valorem* according to the reaſonable eſtimate between the merchant and the cuſtomer.

Thus much concerning the ſubſidies in the time of queen Mary.

As touching the cuſtomes both great and ſmall, they ſtood as they were in the times of former kings. Only as to cloth, as is before obſerved, whereas the cuſtome impoſed thereupon by king Edward the third was 14d. upon every ſhort cloth of denizens and 21d. upon aliens, which allowing four ſuch cloths to a ſack of wooll aroſe to 4s. 8d. upon denizens, and 7s. upon aliens; by decree of council 4. *et* 5. P. and M. *Rot. Parl. parte* 3 *dorſo*, the cuſtome of a ſhort cloth upon denizens was ſett to ſix ſhillings and eight-pence, and upon aliens to 13s. 4d. viz. double to denizens. Wherein though the ſack of wooll, which made four cloths, yielded 33s. 4d. upon denizens, and three pounds upon aliens, beſides the cuſtomes; yet this cuſtome upon cloths did not anſwer the proportion

proportion of the subsidy and custom of the sack; for it came but to 26*s.* 8*d.* of denizens, whereas the subsidy and custome of a sack came to 40*s.* and of aliens to 58*s.* whereas their subsidy of a sack came to four pounds.

And there was a reduction likewise of other cloths, as streits, kerseys, &c. to the proportionable subsidy of broad cloths.

This though it were complained of as an imposition 1. Eliz. Dy. 165. yet it continued during the times of all her successors, as appears by the book of rates set forth in 2. Jac. and the warrant for the same 26 Nov. 2. James; and the reason was, because it seemed to be warranted at least by the equity of the old custome of woolls; for cloth exported was yet so much wooll exported, though turned into a manufacture, and therefore it retained the name of custome, and not of imposition.

The queen, also, after a long intermission of impositions by her predecessors, did set an imposition of 40*s.* a tun upon French wine imported; which in truth was not so much an imposition as a bargain for a dispensation: for in the fifth year of her reign, she issued a proclamation prohibiting the impo tation of French wines, and immediately after made an order of council that any might import paying 40*s.* per tun by the name of impost. But this did not create a duty, neither indeed could; and therefore Parl. 1. Eliz. in the king's remembrancer's office there was an information against Germane Ciol for not paying that imposition for wine imported. He pleads a lycence 1. 2. Mary to import French wines for a certain time, notwithstanding any restraint made or to be made, provided that the customes, subsidies and other duties due and accustomed to be paid to the king and queen, were duly satisfied. He avers, that he paid for these wines three shillings for every tun, being all that was due and accustomed to be paid. (*Nota:* the importation was after the imposition of forty shillings sett:) It was hereupon demurred, and judgment for the defendant. But possibly this judgment might be upon some matter by the by.

She also laid an imposition upon all French commodities; and it continued to be taken for some time in the first year of queen Elizabeth, but then was discontinued.

And thus much shall suffice for the time of queen Mary.

Touching the time of queen Elizabeth, who began her reign November 17, 1558, by the statute of 1. Eliz. cap. 19. in the parliament which began 23 January 1. Eliz. the subsidy of tunnage and poundage, woolls, woollfells and leather is granted to queen Elizabeth during her life, from the 16 Nov. last, with the same exceptions, provisions and penalties as in the act of the

grant thereof to queen Mary. Whether ſhe continued the cuſtom of cloth in the ſame manner as queen Mary left, I find not in any memorials of impoſitions in her time: yet ſome there were. She collected the ſubſidies according to the book of rates ſettled by queen Mary.

I come to the time of king James, who began his reign 24 March, 1603.

By the ſtatute of 1. *Jac. cap.* 33. the ſubſidy of tunnage and poundage, woolls and woollfells was granted to king James during his life, from 18th March laſt, in the ſame proportion and ſums and with the ſame exceptions, penalties, &c. as they were granted to queen Elizabeth and queen Mary, with a farther exemption of herrings and ſea-fiſh from cuſtome.

26 November, 2. *Jac.* the king by his letters under his privy ſeal did ſettle a new book of rates, which was printed with that letter, and continued the cuſtom of cloth as it was ſett by queen Mary.

After this in the year of his reign the king to improve his revenues began to ſett impoſitions beyond the ſubſidy granted. He began with currants.

Bates, a merchant, refuſing to pay this impoſition, an information was exhibited againſt him in the exchequer for the contempt. And *Mich.* 4. *Jac.* judgment was given by the then barons for the king.*

Way now being made by this judgment, the king, by his letters patent under his great ſeal with a book of rates annext, bearing date 28 July, 6. *Jac.* doth not only ſettle the rates of merchandizes, but alſo almoſt upon all merchandizes ſetts an impoſt or impoſition beſides the cuſtom and ſubſidy ſettled by act of parliament; as for inſtance, the ſubſidy of Gaſcoigne wine imported by denizens was 3*s.* the impoſt was 42*s.* and 15*s.* ſo the whole duty 3*l.* &c.

Much conteſt there was againſt theſe impoſitions and againſt the judgment in Bates's caſe in ſeverall parliaments, as may be ſeen in the collections of Sir Edward Cooke upon the 30th chapter of *Magna Charta*†. But whatever the law was, yet the reaſon of ſtate to make a ballance between the trades here and beyond ſeas, and divers other matters, prevailed; and theſe impoſts were taken all the life-time of king James.

* In the new edition of the State Trials there is an account of Bates's caſe, and of the proceedings upon it. See vol. xi. page 29.—EDITOR.

† 2. Inſt. 58.—EDITOR.

And

And beſides this, about the middle of king James, although by the warrant and book of rates 2. and 6. *Jac.* the cuſtom of cloth was taken as it was in queen Mary's days, and ſo directed, yet ſome inquiſitive cuſtomers found that that cuſtom ſo ſett in queen Mary's time, viz. 6s. 8d. upon a ſhort cloth of denizens, did not countervaile the cuſtome and ſubſidy of a ſack of wooll, which of denizens was 33s. 4d. ſubſidy and 6s. 8d. cuſtom, *in toto* 40s. for one ſack would make four clothes, which at 6s. 8d. per cloth amounted to 26s. 8d. of denizens. And therefore there was 3s. 4d. added to the cuſtom of four ſhort clothes, viz. *in toto* 10s. the cloth, which balanced the ſubſidy and cuſtom of a ſack of wooll of denizens. And the like proportion was taken upon cloth exported by aliens to ballance their ſubſidy and cuſtom of wooll, viz. 4l. And theſe were called pretermitted cuſtomes, and were ſometimes exacted, but complained of in parliament, and ſo intermitted.

In 12. *Jac.* Swinerton, being farmer of the cuſtom of wines, there grew ſome difference between the farmer and merchant touching ſome reaſonable allowance to be made for leakage of wines, becauſe wines, eſpecially Spaniſh, partly by accident and partly by their own nature, would waſte at ſea; and it was not poſſible without much inconveniency to fill up their veſſels, for it may be they had not wines of their own of the kind; neither was it reaſonable to pay full tunnage, where poſſibly the veſſel might be half empty; and beſides, it would be troubleſome to gauge every veſſel. They came therefore to this agreement, that the merchant ſhould not fill up in the port, but ſhould have an allowance of twelve pound per cent. for leakage out of his cuſtoms and impoſt; and this was ſettled by order of the council 12. *Jac.*

And this is as much as I ſhall ſpeak concerning the time of king James.

King Charles the firſt ſucceeding him, there grew differences between him and his houſes of parliament in 1. and 3. Car. ſo that there was no ſubſidy of tunnage and poundage granted to him. Only he had the great cuſtoms of woolls, woollfells and leather, which was inſignificant in reſpect of the inhibition of exportation of thoſe commodities. He had alſo the petty cuſtomes of aliens and that of cloth. But theſe were not ſufficient to ſupport the charge and dignity of his majeſty.

He therefore for his great neceſſity turned what was received by his father by way of ſubſidy and impoſt into one great impoſt; and accordingly the ſame was collected by the king's farmers from the firſt till the 16. Car. at which time the long parliament of 16. Car. began*.

* See 9. Parl. Hiſt. 310. 327. 339 —— EDITOR.

The farmers of theſe impoſitions in the parliament of 16. Car. are called to an account for receiving of theſe impoſitions without authority of parliament; and they and their partners, to avoid the ſeverity of the houſe, made a compoſition in nature of a fine of for their peace, which was accordingly paid*.

The ſubſidy of tunnage and poundage was granted to the king in 16. and 17. Car. for ſome ſmall time †; but the difference broke out between the king and his houſes of parliament, before they were ſettled upon him for his life.

Nevertheleſs the bill was prepared for that purpoſe, wherein the right alſo of the ſubject againſt impoſitions, and a particular enumeration of thoſe duties upon merchandize, which do of right belong to the crown. But this bill paſſed not the king's conſent.

During the time of the late troubles, theſe were taken ſometimes by way of loan or advance, then by ordinances of both houſes, then by the temporary edicts of thoſe that *de facto* obtained the power during the king's life, and after his death until the return of his now majeſty in the 12th year of his reign, whereof in the next chapter.

* The proceedings on this compoſition may be traced by conſulting the Journals of the Commons in the places referred to under the head of *Cuſtomers* in the Index to the 2d volume: and by them it appears, that a compoſition of 150,000l. was agreed upon; but it is not quite clear, whether this was a ſum for the whole body of farmers of the cuſtoms, or only a part of them.——EDITOR.

† The act granting this ſubſidy of tonnage and poundage is not in print. But lord Clarendon gives part of the preamble, according to which it contained the fulleſt diſavowal of the claim of the crown to tax at the ports. 1. Clarend. Hiſt. 8vo. ed. 264. The king's ſpeech on giving his aſſent to the act confirms this; his words being, "in this particular bill I hope you will know, that I do freely and frankly *give over* "the right which my predeceſſors have ever challenged unto them, though I confeſs "diſputed; but yet they did never yield it in their times." Ruſhw. part 3. vol. 1. page 297. 9 Parl. Hiſt. 384.—Upon a further ſearch I find a ſhort ſtatement of the act in Ruſhworth. From this it appears, that the act recited it to be the ancient right of the ſubjects of this realm to have no ſubſidy, cuſtom, impoſt or charge laid upon merchandize exported or imported by denizens or aliens, without conſent of parliament. But the act did not ſtop here; for it made receiving any duty not warranted by grant in parliament highly penal: the act containing a proviſion, that if any perſon ſhould take or receive any impoſition laid on merchandize *except by grant in parliament*, he ſhould incur the forfeitures provided by the ſtatute of *Præmunire* of the 16. R. 2. See Ruſh. vol. 2. of 2d part 1382. Other ſtatutes have condemned the practice of levying taxes on the ſubject without grant in parliament in very reſentful term. Thus the ſtatute of 34. E. 1. *de tallagio non concedendo* concludes with a direction, that the archbiſhops and biſhops ſhould *for ever* read that ſtatute in their cathedrals twice a year, and denounce accurſed all infringers of it. But this act of Charles I believe was the firſt inſtance of a fixed penalty *in terrorem* againſt the mere receivers of an unlawful tax: nor on the Reſtoration was it deemed neceſſary to adopt an example of ſuch extremity; ſimply declaring what is the conſtitutional mode of taxation being then thought very adequate to guard againſt future encroachments.——EDITOR.

CAP.

CAP. XVI.

Concerning the ſubſidies and cuſtomes as they now ſtand in the time of king Charles 2.

BY the act of parliament 12. *Car.* 2^di^. *c.* 4. the ſubſidy of tunnage and poundage, &c. is granted to the king for his life under ſome difference of rates than formerly, viz.

As to tunnage:

Of French wines imported into London and the members thereof by way of merchandize, by natural-born ſubjects 4*l.* 10*s.* per tun, by ſtrangers 6*l.* per tun.

Of French wine imported into other ports, by natural-born ſubjects 3*l.* per tun, by aliens 4*l.* 10*s.* per tun.

Of ſweet wines imported into London, by natural-born ſubjects 45*s.* per butt, by aliens 3*l.* per butt.

Of every ſweet wine imported into other ports, by natural born ſubjects, 30*s.* per butt, by aliens 45*s.* per butt.

Of every awm of Rheniſh wine imported by natural-born ſubjects 20*s.* by aliens 25*s.*

An additional duty

Of French, Spaniſh, Portugueze, German, and Madeira wines, 3*l.* per tun.

Of other wine 4*l.* to be paid in nine months.

A ſubſidy of poundage, viz.

12*d.* of every 20*s.* value of merchandize exported or imported by way of merchandize.

Of Engliſh commodities or manufactures exported by aliens 12*d.* more of every 20*s.* except woollen cloth wrought in England, called old draperies, wines, fiſh taken by Engliſh, freſh fiſh, beſtiall.

Of every ſhort woollen cloth called broad cloth exported by natural ſubjects not exceeding 28 yards, 3*s.* 4*d.* if exceeding it *pro ratâ*, if ſhorter *pro ratâ*, and exported by ſtrangers 6*s.* 8*d.*

A book of rates ſettled the forfeiture of goods uncuſtomed, &c.

Proviſion for goods loſt at ſea.

Goods ſhipped in carricks or galleys to pay aliens cuſtomes.

Some goods formerly prohibited licenced to be exported.

Priſage not charged with cuſtom.

The

The book of rates follows, and therein divers rules; among which the firſt is, that no duty ſhall be paid for more than is entered and landed. The laſt is, that no other duties be paid during the continuance of theſe, but only the duties enacted, priſage, butlerage, and the impoſition upon coals.

And this is now the great and only rule, by which the duties of merchandizes exported or imported are to be ruled and governed. For all other duties, whether by common law or act of parliament or impoſition, are now under ſuſpence during the continuance of this grant, by the laſt rule of the book of rates*.

And thus I have gone through the hiſtory, or narrative, of the ſucceſſive progreſs and various alterations of duties ariſing upon goods imported or exported, whether they be cuſtomes or ſubſidies, or impoſitions, as far as I can meet with any evidences concerning them. And now I ſhall proceed to more cloſe and particular diſcourſes touching theſe duties.

CAP. XVII.

A general ſcheme of the cuſtomes as they ſtood in the time of E. 4.

IN the former diſcourſes there lies diſperſedly and ſcatteredly moſt of what is to be ſaid concerning cuſtomes, viz. their kinds, the times when and manner how they began, their encreaſes and variations, the perſons by whom due, and the accidents that excuſed them, the means of their recovery, and ſome other particulars of this kind.

But becauſe they lie diſperſedly in ſeveral places, and the mentioning them is rather for the continuation of the hiſtory than *ex propoſito* to treat of them, I ſhall reſume them in this order.

Firſt, I will begin with theſe that are the cuſtomes of inheritance, and therein of their ſeveral natures, when and by whom due, and how recoverable; many of which conſiderations will be very appoſite and uſefull to the ſecond and third heads, and will be in many things coincident with them, or very explanatory of them.

* It ſeems proper to add to lord Hale's account of the firſt grant of tonnage and poundage after the Reſtoration, that one clauſe in it contains a recital, that "no "rates can be impoſed upon merchandize imported or exported by ſubjects or aliens "but by common conſent in parliament." 12. Cha. 2. c. 4, ſ. 6.

Secondly,

Secondly, concerning impoſitions, and the right and power of impoſing duties upon merchandizes exported or imported.

Thirdly, concerning the ſubſidy of tunnage and poundage as it ſtands ſettled by act of parliament, and the queſtions that may ariſe upon various clauſes of the ſame.

I ſhall be longer in the firſt of theſe heads, becauſe much of what will be ſaid therein will be uſefull and applicable in many particulars to the laſt of theſe. And beſides, though at preſent all theſe former cuſtoms are under ſuſpence; yet there is very excellent learning to be found in ancient records concerning them, which is worth the knowledge.

Firſt therefore I ſhall ſett down a ſcheme of thoſe old cuſtomes, partly from the records themſelves, partly from the black book in the Admiralty, which hath the ſcheme of them as they ſtood at the finiſhing of that book, which I think was in the time of E. 4. and upon comparing of the cuſtomers accounts of that time I find them exactly agreeing.

I. Firſt therefore touching the cuſtom of woolls, woollfells and leather, commonly called the great cuſtom, ſettled as hath been ſhewn by the act of parliament 3. E. 1. and deſcended to his ſucceſſors *jure hereditarii*, viz. *magna cuſtuma*.

1. Of every ſack of wooll and of every 240 woollfells exported, by denizens 6*s*. 8*d*. by aliens 10*s*.

2. Of every laſt of hides containing 20 dickers, and every dicker ten hides, exported, of denizens 13*s*. 4*d*. of aliens 20*s*.

There aroſe certain other cuſtomes incident to woolls, woollfells and hides, and therefore accounted for together with the great cuſtomes. Theſe cuſtomes were of two kinds, viz.

1. The cocquet, viz. of every merchant, denizen or alien exporting woolls, woollfells or leather 2*d*.

2. The devoirs of Calais, where ordinarily the ſtaple was, which began the 45. E. 3. and continued conſtantly after anſwered, at leaſt till the end of E. 4. viz. of every ſack of wooll or 240 woollfells exported by aliens or denizens 8*d*. of every laſt of hides exported by aliens or denizens 16*d*.

And beſides theſe we may reckon among thoſe great cuſtoms,

Ob. et——which continued payable upon every ſack of wooll.

3*d*. *per lib*. upon lead ſet by the ſtatute of 27. E. 3.

II. The *parva cuſtuma*; and that was upon four ſorts of commodities, viz. cloth, wax, wines, and averdupoiſe, or other ſorts of merchandize, which was their poundage.

(1.) The

(1.) The petit cuſtome of cloth, viz. of theſe ſeveral kinds:

1. Cloth of ſcarlet or whole grain exported.

1. By denizens. The impoſition of 21. E. 3. ſet upon them 2*s.* 4*d.*

2. By aliens. They paid 2*s.* by virtue of *Carta Mercatoria*, and 3*s.* 1*d.* by the impoſition upon cloth began the 21. E. 3. *in toto* 5*s.* 1*d*

3. By the Hanſe merchants by the virtue of the *Carta Mercatoria*, at which rate they paid 2*s.* but in the time of E. 4. they paid 5*s.* 6*d.* viz. 2*s.* by *Carta Mercatoria*, and 3*s.* 6*d.* by impoſition.

2. Cloth half grain.

1. Denizens paid 21*d.* by the impoſition begun upon cloth the 21. E. 3. which though at firſt it was 14*d.* it was after raiſed to 21*d.* upon denizens, and ſo held.

2. Aliens paid 4*s.* 1*d.* whereof 18*d.* was the compoſition rate ſet by *Carta Mercatoria*; the reſidue, viz. 2*s.* 7*d.* was ſet by impoſitions afterward.

3. Hanſe or Almaine merchants paid only 18*d.* being the rate ſet by *Carta Mercatoria*, which they kept by virtue of their charters of privilege, notwithſtanding the additional impoſition upon cloth.

3. Cloth without grain.

1. Of denizens 14*d.* by virtue of the impoſition ſet by the 21. E. 3.

2. Of aliens 2*s.* 9*d.* viz. 12d. by virtue of *Carta Mercatoria*, and 21*d.* by the impoſition of 21. E. 3. ſet upon the cloth exported by aliens.

3. Of Hanſe and Almaine merchants 12*d.* only by virtue of *Carta Mercatoria*, for they had by virtue of their charters an exemption from the payment of the 21*d.* paid by other aliens as before.

And note, that for theſe clothes aliens paid no poundage, viz. no 3*d.* *per libram*; for the *Carta Mercatoria* letting part of theſe duties, the 3*d.* per pound was not paid for theſe.

4. The cuſtomes of worſted.

Theſe were impoſed by the king and his council 21. E. 3. in compenſation of woolls, whereby they were made. This, though in the firſt impoſition it was for the piece exported by denizens 1*d.* and by aliens 1*d. ob.* and for a bed of worſted by denizens 10*d.* by aliens 15*d.* yet, the manufacture receiving an alteration, there was in proceſs of time alteration of the cuſtom, viz.

For pieces of worſted,

Denizens 2*d.*

Of aliens 3*d.* beſides their 3*d.* per lb. by virtue of *Carta Mercatoria.*

Fo

For a ſingle piece of worſted,
Denizens 1d.
Aliens 1d. *ob.* beſides their 3d. for poundage.
For bedds of worſted, viz.
For double bedds,
Of denizens 10d.
Of aliens 13d. *ob.* beſides their poundage, viz. 3d.
For half doubles,
Of denizens 7d.
Of aliens 10d. *ob.* beſides their poundage of 3d.
For ſingle bedds,
Of denizens 5d.
Of aliens 7d. *ob.* beſides their poundage of 3d.

But the Hanſe merchants paid only 2d. for pieces or for bedds of worſted, beſides their poundage of 3d.

But note, that during the time of king Edward the 4th by a ſpecial charter the Spaniſh merchants paid only Engliſh cuſtomes.

(2.) The ſecond general of the petty cuſtomes was wax, viz. of every quintal of wax there was paid,

By denizens 2s. which grew by impoſition; and this they paid beſides their poundage of 12d. *per lib.* when that ſubſidy was granted.

By aliens, as well Hanſe as others, 12d. for every quintal.

(3.) The cuſtomes of wines, viz. 2s. per tun in lieu of priſage by *Carta Mercatoria*, paid by all aliens, as well Hanſe as others.

(4.) Their cuſtomes of averdupoiſe, viz. 3d. for the value of every 20s. paid by the merchants aliens, as well Hanſe as others.

Theſe are thoſe which are collected as the petty cuſtomes.

And 1. it is to be obſerved, that when any ſubſidy of tunnage was granted generally of aliens and denizens, unleſs there were ſpecial proviſion by the act of ſubſidies to the contrary, aliens did not only anſwer the ſubſidy of poundage, but alſo their petty cuſtom of poundage, viz. 3d. *per lib.* as appears by all the cuſtomers accounts, eſpecially *tempore E.* 4.

2. It is alſo to be obſerved, that upon thoſe clothes, whereupon the petty cuſtom was granted by *Carta Mercatoria*, as ſcarletts, half grain, and cloth of aſſiſe without grain, the aliens paid not only the duty by *Carta Mercatoria*, but alſo that additional cuſtom or impoſition, which was after ſet upon cloth to ballance the cuſtom of wooll, unleſs the Hanſe merchants, who moſt ordinarily paid only the cuſtome ſett by *Carta Mercatoria.*

3. But

3. But of thoſe clothes which were not expreſly charged with cuſtome as cloth by *Carta Mercatoria*, but were rated to a cuſtom proportionable to the woolls whereby they were made, which began as hath been ſhewn 21. E. 1. and was after inhanced, as worſteds; aliens did not only pay their impoſition ſet upon thoſe clothes, but alſo their poundage of 3d. for the value of every twenty ſhillings; and this was paid as well by the Hanſe merchants as others. And the reaſon was, becauſe, before this impoſition upon it as a manufacture of wooll, it was charged with 3d. per pound as averdupois.

Though ſometimes they had intruſions, yet it revived again. This ſhall be ſhewn more at large in the next chapter.

CAP. XVIII.

Concerning aliens and their cuſtomes; and firſt concerning the Hanſe merchants, and their privileges in relation to the cuſtomes:

IN the precedent chapters we ſee frequently a difference between the cuſtomes of aliens and denizens; and among the aliens we ſee a difference between the cuſtomes of aliens themſelves. The Hanſe or Almaine merchants paid a ſmaller cuſtome, and ſometimes a ſmaller ſubſidie than other aliens; although ſometimes in their ſubſidies they were reduced to the ſame meaſure as it is this day.

I ſhall therefore, in the firſt place, ſett down the narrative concerning the Hanſe merchants, and the progreſs of their privileges in relation to the cuſtomes; wherein, though there will be ſome things that will be applicable to merchants aliens in general, yet the principal ſcope will be to derive the privileges of the Hanſe merchants: and when that is done, I ſhall deſcend to the conſideration of aliens in their latitude, and who they are.

Narrative concerning the Hanſe merchants.

Although the merchants of Almaine, ſometimes called *mercatores Almaniæ*, ſometimes Hanſe merchants, ſometimes Eaſterlings, had many ſpecial privileges granted them in the time of Hen. 3. and perchance alſo before, which poſſibly were the foundation of the acceſſions of privileges which they had in the times of ſucceeding kings; yet I ſhall not go ſo high in the deducing of their privileges, becauſe, as the great ſettlement of the cuſtomes began in the time of E. 1. ſo the privileges and exemptions of the Hanſe merchants in relation to thoſe cuſtomes, principally began in the times that ſucceeded that general ſettlement of the cuſtomes in the time of E. 1.

In

In the first settlement of the great customes *anno* 3. E. 1. it appears to be without any distinction between denizens and aliens: they paid alike; but the discrimination grew at first by the *Carta Mercatoria* 3. E. 1.

By that charter the king granted the liberties therein comprized to all merchants strangers of all countries, with which any commerce was then used, viz. *Almaniæ, Franciæ, Hispaniæ, Portugalliæ, Navarræ, Lumbardiæ, Tusciæ, Provinciæ, Cataloniæ, Ducatus Acquittaniæ, Tholosanæ, Tartarinæ, Flandriæ, et omnium aliarum terrarum et locorum extranearum venientibus in regnum Angliæ.* And all these foreign merchants granted to the king and his successors these aliens customes comprized in that charter. And accordingly the customs hereby granted were enjoyed till the resumption in 5. E. 2. which resumption thereof was afterwards repealed 15. E. 2. as hath been shewn. So that this was in nature of a great contract between the king and the merchants, and carried in it a reciprocal consideration, viz. liberties and privileges to the alien merchants, and advance of old customes and grant of new to the crown by them.

In the latter end of that charter there is this clause: *Volumus autem, ac pro nobis hæredibus et successoribus nostris concedimus, quòd nulla exactio, prisa, vel prestatio, aut aliquod aliud onus, super personas mercatorum prædictorum, mercandisas seu bona eorundem, aliquatenus imponatur contra formam expressam superius et concessam.*

This should seem to be a general concession to all foreign merchants, exempting them from all new customes or impositions thereafter to be imposed. But it prevailed not in that latitude, as shall be shewn.

But, besides this general charter granted to merchants strangers, the Hanse merchants, which were but a branch of the merchants of Almaine, had more particular liberties granted to them; for 1. H. 3. there was granted to them a house in London called *Guildhalda Teutonicorum*, which was afterwards confirmed by E. 1.*.

These Hanse merchants were those merchants of those great towns in Germany lying upon or near the Baltic sea, and are at this day called the Hanse towns, consisting of four principal head quarters, viz. Lubeck, Cologn, Brunswicke, and Dantzicke, with their under quarter towns.

There was a pretended defect espied in the charter of E. 1. to the Hanse merchants; because the charter was not granted *pro se et hæredibus.* And thereupon the 7th December 11. E. 2.

* The place thus granted by Henry the third to the Hanse merchants is known by the name of the Steleyard or Stelehouse. See Stowe's London, Strype's ed. in 1720, book 2. page 202.—EDITOR.

there

there was a new charter granted to the Almaine merchants, not in general, but *illis scilicet, qui habent domum in civitate London' quæ Guyldhalda Teutonicorum vulgariter nuncupatur*, which were the Hanse merchants. By this charter the king confirms their liberties formerly granted as well by *Carta Mercatoria*, as by the particular charters; and further grants in express words, *quòd nos vel hæredes nostri, super ipsos aut eorum bona vel mercimonia, custumam novam indebitam non ponemus, salvis nobis et hæredibus nostris antiquis prisis nostris; quòdque ipsi per totum regnum nostrum de bonis et mercimoniis suis de pontagio pavagio et muragio in perpetuum sint quieti, ita tamen quòd aliquem, qui de guildâ ipsorum antepræditt' non existet, nec ejus bona seu mercimonia, de guildâ suâ non advocent ullo modo.*

This charter was confirmed by king E. 3. 14. *Martii* 1. E. 3. by R. 2. 6 Nov. 1. R. 2. and after all by king E. 4. by consent of parliament 13. E. 4 *. as shall be shewn.

By these charters and confirmations the Hanse merchants had not only personal privileges, as they were merchants, but they obtained the effect of an incorporation, and also held the Stillyard as the house of their incorporation in succession.

By virtue of these charters thus express, especially that of E. 2. they enjoyed certain exemptions in relation to customes, which were not allowed to other merchants aliens, though in some things their charge was alike, as before shewn in the precedent chapter.

For instance,—It hath been before shewn, that besides the customes of cloth sett by *Carta Mercatoria*, there began in the 21. E. 3. an imposition or custome to be sett upon cloth and worsteds in proportion to the custome of a sack of wooll; which new custome or imposition in process of time was inhanced, as appears by the scheme of the customes in the precedent chapter. And all aliens except the Hanse did not only pay their custome contained in *Carta Mercatoria*, but also the new imposed custom laid upon cloths 21. E. 1. and in the succeeding times. But the Hanse merchants had a greater liberty by reason of that clause of exemption in the charter of E. 2.—For some time they paid the 21d. imposed upon cloth 21. E. 3. But when they paid that, they were exempted from payment of the 12d. and 18s. and 2s. set by *Carta Mercatoria*, as appears by the king's writ pleaded and allowed *Communia Pasch.* 35. *E.* 3. *pro Johanne de Pan'try et Willielmo de Clapton collectoribus parvæ custumæ London'*, whereby the merchants of Almaine paying the 21d. upon a cloth imposed by 21. E. 3. are acquitted of the 12d. sett by *Carta Mercatoria*. But afterwards the Hanse merchants rather chose to pay the duty upon cloth sett *Carta Mer-*

* See 6. Rot. Parl. 67.—EDITOR.

catoria,

catoria, and were diſcharged of theſe new impoſitions made ſet by 21. E. 3. as appears by the ſcheme above expreſſed.—Again, for pieces of cloth and narrow cloth, that were not chargeable by *Carta Mercatoria*, all aliens paid only their poundage until 21. E. 3. when a rateable impoſition of 21d. per cloth was ſet upon ſuch pieces and narrow clothes; and then they paid not only their poundage, but alſo the rateable impoſition. But *Communia* 35. *E.* 3. *ubi ſupra*, the Hanſe merchants paid only their poundage for ſuch narrow clothes and remnants, and not the rateble cuſtome of 21d. for a whole cloth.—Again, whereas until the the 21. E. 3. all merchants aliens paid only poundage of 3d. *per libram* for worſted of all ſorts, and 21. E. 3. a rateable cuſtome was ſet upon them proportionable to a ſack of wooll, whereupon other merchants aliens were not only forced to pay the new impoſitions, but alſo 3d. *per lib.* for poundage; the Hanſe merchants, by writ entered upon the laſt mentioned record, were diſcharged of the impoſition upon worſteds ſet by the 21. E. 3. and paid only their poundage. Only for bedds of worſteds, they were enforced to pay 2d. per bedd, over and beſides their poundage.

And theſe differences were bottomed upon theſe exemptions, that the Hanſe merchants had by virue of the charter of E. 2. from new cuſtomes or impoſitions.

And although in ſome acts of parliament of the grant of tonnage and poundage the charge is laid equally upon all aliens, yet in ſome of the acts there is proviſion for the Hanſe merchants to be charged only with their old cuſtome 1. E. 6. cap. 13. But at this day their is no ſpeciall proviſion for the Hanſe merchants in the ſubſidies of tonnage and poundage, but they are equally charged with other aliens.

The Hanſe merchants had their divers viciſſitudes.

In the times of H. 6. they were in diſpleaſure with the Engliſh, and the Engliſh with them. There were many violences and injuries uſed on both ſides; and it grew to that height, that, in the acts of tunnage and poundage and other new ſubſidies, there was no proviſion for them; but contrarily there were many times derogatory clauſes in thoſe acts, whereby they were expreſsly put into the ſame common conſideration with other aliens. *Rot. Parl.* 31. *H.* 6. *n.* 8. And yet farther by an expreſs act of parliament, viz. *Rot. Parl. H.* 6. *n.* all their franchiſes and privileges are reſumed.

The reſumption and ſuſpenſion of their privileges continued all the time of H. 6. But E. 4. taking upon him the crown, the Hanſe merchants fall in with the new king; and poſſibly he thought it his advantage to engage them; and from the firſt entrance of his reign he received them into great favor, which he continued all his life.

And

And whereas by reaſon of the acts of reſumption in the time of H. 6. the Hanſe merchants were charged with cuſtomes ſubſidies and impoſitions as other aliens, eſpecially as to cloth exported; the king, by his privy ſeal directed to the treaſurer and barons P. 1. E. 4. and by judgment of the court of exchequer thereupon, diſcharged the Hanſe merchants of the impoſitions upon cloth ſett 21. E. 3. and they are only charged with the ſums charged upon cloth by *Carta Mercatoria*, viz. two ſhillings of cloth of graine, eighteen-pence of cloth of half graine, and one ſhilling of cloth of aſſiſe without any graine. *Vide inter compota pervæ cuſtumæ in London' anno* 1. *E.* 4.

4. E. 4. cap. . in the act made againſt aliens merchants, ſpecial proviſion is made for the Hanſe merchants, and a ſpecial clauſe for the confirming of their charters and liberties, viz. the merchants of the Hanſe having *Guildhaldam Teutonicorum.*

Rot. Parl. 13. *E.* 4. *n.* 2. the king reciting the former intercourſe of trade between the Engliſh and the merchants and people of the nation of Almaine, being under and of the confederation, leige and company called the Dutch Horif, otherwiſe called the merchants of Almaine, and having the houſe in London called *Guildhaldam Teutonicorum* (note the deſcription and reſtriction of the company) by ſpecial charters made and confirmed in parliament, all their charters are recited and confirmed; and it is further particularly enacted, *that no priſes, exactions nor preſtations ſhall be ſette uppon their perſons or goods, otherwiſe than have been ſette uppon them any tyme before this* c. *yere nowe laſt or above.* The tenor of the king's confirmation in parliament, after the recital of the charters, runs thus: *Nos conſiderantes, prefatos mercatores Alemann' mercatores Hanze Teutonice vulgariter nuncupat' in dicto regno et dominiis noſtris, dictis ſuis privilegiis libertatibus conceſſionibus et indultis, occaſione guerrarum turbationum et hoſtilitatum jam nuper inter ſubditos noſtros et ipſos de Hanzâ predictâ contingentium, deſtitutos et exinde tam ipſos quàm ſubditos noſtros multipliciter fuiſſe et eſſe leſos, ex certis bonis reſpectibus nos moventibus, de adviſamento et aſſenſu dominorum ſpiritualium et temporalium et communitatis regni noſtri Angliæ in preſenti parliamento noſtro exiſtentium, et auctoritate ejuſdem parliamenti, et ex certâ noſtrâ ſcientiâ, pro nobis et heredibus ac univerſis ſucceſſoribus noſtris ipſos mercatores Hanze in priſtinum ſtatum utendi et fruendi in dicto regno noſtro et aliis locis nobis ſubjectis, ſupradictis ſuis omnibus et ſingulis privilegiis libertatibus conceſſionibus et indultis, quo fuerunt aut eſſe debuerunt, ſi guerre turbationis et hoſtilitates hujuſmodi non contigiſſent, reponend' et integrè reſtituend' duximus, ac tenore preſentium reponimus et integrè reſtituimus, ſic quòd ſupradicti mercatores Hanze predicte, et eorum ſucceſſores, univerſis privilegiis libertatibus conceſſionibus et indultis predictis*

dictis uti et frui debeant perpetuis futuris temporibus, eo modo quo uſi ſunt aut uſi fuiſſent, ſi predicte guerre turbationes et hoſtilitates non accidiſſent; ac preterea eiſdem mercatoribus Hanze ipſa eadem privilegia libertates conceſſiones et indulta, pro ſe et ſuis ſucceſſoribus, approbando et ratificando innovamus et confirmamus, &c.

By the ſtrength of this act of parliament and charter the former liberties of the Hanſe merchants are revived, and indeed made more ſtrong and effectuall; for whereas there poſſibly was not before a politick capacity or corporation ſettled, whereby they might be capable to take in ſucceſſion, or at leaſt it might have been queſtionable; the ſtrength of this act of parliament, as to the purpoſe at leaſt of enjoying their liberties and houſe, gives them a perpetuall ſucceſſion, for the very implication of an act of parliament may create a capacity.

But yet the bounty of the king towards theſe merchants of Hanſe reſted not here. But *Rot. Parl.* 14. *E.* 4. *n.* 15. it is recited, that, whereas for the reducing of the merchants of Almaine being of the leige and confederation of the Dutch Hanſe to the old intercourſes of merchandize with the Engliſh it hath been agreed between the king and the people of the ſaid Dutch Hanſe, that the merchants of the Hanſe ſhould have a certain place within the city of London, called Stillhof, otherwiſe the Stillyard, with divers houſes thereunto adjoining, to them and their ſucceſſors, &c. and whereas the mayor and commonality of London be ſeized of the place called the Stillyard under certain truſts according to the will of John Reynwell, and likewiſe the biſhop of Wincheſter and ſome other religious houſes be ſeized of certain other lands adjacent, &c. it is enacted, that the merchants of Almaine being of and under the confederation leige, and company of the Dutch Hanſe, otherwiſe called the merchants of Almaine, having an houſe in the city of London called *Guildhalda Teutonicorum*, that be or hereafter ſhall be, ſhall hold and enjoy to them and their ſucceſſors the ſaid houſes. Proviſion is made for the performing of the charitable bequeſt, and alſo the king makes by that act compenſation to the religious houſes for their rents and inheritances.

This is the firſt ſettlement of the houſe called the Stillyard upon them.

They had indeed formerly their *Guildhalda Teutonicorum*, or their common hall, but not the Stillyard in perpetuity till now.

Two things are obſervable upon this charter, viz.

1. That it was not all the merchants of Almaine that had thoſe liberties; but the Hanſe merchants which were confederate into a kind of trading body, and had their corporation, as it were, at their Guidhall in London.

2. Here

2. Here is the name of their corporation and their ſucceſſion, in which capacity they did take and to this day hold that houſe called the Stillyard.

By the ſtatute of 19. H. 7. cap. 23. all acts touching merchandize prejudicial to the merchants of the Stillyard repealed as to them and their liberties.

By the ſtatute of 22. H. 8. cap. 8. whereby aliens made denizens are made liable to aliens cuſtoms, proviſion is made nevertheleſs for the Hanſe merchants of the *Guildhalda Teutonicorum*, that they be not thereby prejudiced.

In the beginning of the reign of E. 6. there was a great care for them, inſomuch as in the very ſubſidy of tunnage and poundage, there is proviſion made for their indemnity againſt the increaſe of their cuſtomes.

But afterwards in the time of the ſame king they were diſcountenanced, and by acts of ſtate their privileges ſuſpended.

In queen Mary's time, upon the account of religion as well as ſtate, they were again received into favour.

In the time of queen Elizabeth, upon the ſame account they were diſcountenanced.

In king James's reign they were again received into favour, and their privileges countenanced by publick acts of the councill.

In the beginning of the reign of king Charles the firſt they began again to be in diſcredit, in ſo much that in 8. *Car.* upon a ſpeciall commiſſion an inquiſition was taken, whereby it was found that their houſe called the Stillyard eſcheated or was forfeited to the crown. But little proceeding, that I can find, was upon that inquiſition.

Of very late years in the time of his now majeſty the former proceedings in the time of his father were endeavoured to be revived, and a patent deſired to be paſſed of their houſe called the Stillyard, upon pretence, that either it did not well paſs to them for want of a ſufficient corporation, or if it did that it was forfeited or diſſolved. But this prevailed not; but by a ſpecial order of the councill dated their title to the Stillyard was aſſerted, and all farther proceedings againſt them ſuperſeded.

CAP.

CAP. XIX.

Concerning aliens at large, and who are liable to alien's cuſtomes.

IT appears by the ſeveral acts of ſubſidies of tunnage and poundage, and alſo by the *Carta Mercatoria*, that aliens were chargeable with greater cuſtomes and ſubſidies than denizens were; and hence grew great diſtinction between denizens and aliens in reſpect of cuſtomes.

Denizens were of two kinds, denizens born and denizens made. And it ſeems theſe paid their duties alike until the ſtatute 1. H. 7. cap. 2. whereby it is enacted, that any perſon made or to be made denizen ſhall pay like cuſtomes and ſubſidies as he ſhould have paid before he was made denizen, any letters patents or ordinances made to the contrary notwithſtanding.

By the ſtatute 11. H. 7. cap. 14. all merchants-ſtrangers, and others made denizens by the king's letters patents or otherwiſe, pay ſuch cuſtomes inwards and outwards, as they ſhould have paid if the ſame grants had not been made.

By the ſtatute of 22. H. 8. cap. 8. the ſame thing in effect is again enacted, viz. that they pay the ſame ſubſidy and cuſtom as they ſhould have paid before they were denizens, *any grant or grants to them made or hereafter to be made, or any act, ſtatute or ordinance to the contrary made or had notwithſtanding.* There is a proviſion, that it ſhould not extend to be prejudiciall to the merchants of the Stillyard, but that they enjoy the privileges they had before this parliament.

Upon theſe ſtatutes theſe things are obſervable, viz.

(1.) That an alien made denizen by letters patents before or after theſe ſtatutes ſhall yet pay alien's cuſtomes; for thoſe ſtatutes have as to this purpoſe reſtrained and qualified his indenization not to extend to cuſtomes.—But this is intended of a general indenization by letters patents; for the king may at this day, by a ſpecial clauſe in his letters patents, either diſpenſe with theſe ſtatutes, or grant eſpecially, that he ſhall pay cuſtomes and ſubſidies as a free-born denizen, notwithſtanding theſe ſtatutes; for this concerns only the king's intereſt.

(2.) That a perſon naturalized before thoſe acts by act of parliament yet ſhall pay alien's duties. The reaſon is, becauſe theſe acts as to naturalizations precedent do derogate from their privilege; and that,

1. By force of the words *letters patents or otherwiſe**.

2. By force of the derogatory clauſe *any act, ſtatute or ordinance to the contrary notwithſtanding.*

And poſſibly this was one of the reaſons why theſe ſtatutes were ſo often renewed, viz. 1. H. 7. 11. H. 7. and 22. H. 8. to take off the privilege of the perſons naturalized before the acts made.

(3.) But perſons, naturalized by act of parliament after theſe acts, were exempted from the alien's duties; becauſe they are by the act of naturalization rendered to all intents and purpoſes as if born in England, which concludes every man to ſay the contrary; and though an act of parliament may take away the force or effect of a precedent act of parliament, or of a precedent or future patent, yet it cannot take away the force of a future act of parliament.

In the latter acts of ſubſidies there hath been kept the diſtinction between naturall-born ſubjects and ſtrangers, or aliens. And they have uſed the word *naturall-born ſubjects* and not the word *denizens*, which, as hath been ſaid, is more extenſive than the word *naturall-born ſubjects*. Yet the ſtrength of a naturalization is ſo great, that he that is naturalized is a naturall-born ſubject within that act, and ſhall pay only as a naturall-born ſubject pays.

If an alien come into England, and have iſſue here, he is a naturall-born ſubject. Yet (I know not by what law) ſuch a naturall-born ſubject hath been decreed heretofore to pay alien's duties. *Vide Decret.* Poſſibly it may be upon a reaſon of ſtate; becauſe he is as in the next degree to an alien, and the relation ſo near, that he is preſumed more to favour them than the Engliſh. But this is now ſettled; for, by the ſtatute of 14. Car. † touching the cuſtomes, children of aliens under one-and-twenty years, not permitted to trade in their own names.—By 14. and 15. H. 8. c. 4. an Engliſhman ſworn to a foreign prince ſhall pay alien's cuſtomes.

* Theſe words are in the preamble of the 22. H. 8. cap. 14.—EDITOR.

† 13. and 14. Car. 2. c. 11. ſ. 10.—EDITOR.

CAP.

CAP. XX.

When cuſtomes and ſubſidies ſhall be ſaid to be due, and when not.

TOUCHING the time when cuſtomes or ſubſidies ſhall be ſaid to be due to the king, it will fall under a double conſideration, viz.

I. In relation to goods exported, or cuſtomes outward.

II. In relation to goods imported, or cuſtomes inward.

I. As to cuſtomes outward, or cuſtomes of goods exported, it hath been in part touched before in the conſideration of the grant of the cuſtomes of woolls, woollfells and leather.

There are theſe two things that muſt concurr to intitle the king to cuſtomes outward:

(1.) They muſt be ſhipped or laid on board of ſome ſhip or veſſel to be exported.

(2.) They muſt be ſhipped to be exported beyond the ſeas, and immediately upon ſuch ſhipping the king's duty of cuſtomes, and his duty alſo of ſubſidies outward, is veſted in the king.

(1.) It appears by the original grant of the great cuſtomes of woolls, woollfells and leather, that it was to be paid of ſuch goods, *ke viront hors del realme*, that is, as ſoon as they are laid aboard a ſhip or veſſell for that purpoſe, and before they arrive beyond the ſea. For if the king ſhould expect till they come to their foreign port, he might loſe his goods; and the words of the grant of the petty cuſtom by merchant-ſtrangers for goods exported, namely of woolls, woollfells, leather and averdupoiſe, are, *quæ de regno noſtro educent vel educi facient*; as appears by the *Carta Mercatoria* before expreſſed; and yet thoſe cuſtomes outward are due upon the very lading them on board, before they are actually tranſported. So in the grant of the ſubſidy of poundage, cloth, &c. it runs much in the ſame ſtile, viz. one ſubſidy of poundage, that is to ſay, of all goods and merchandize, &c. *to be carried out of the realm or any your Majeſty's dominions to the ſame belonging* twelve-pence for every twenty ſhillings; and ſo in the ſubſidy of cloth to be exported, &c. 3s. 4d. And yet in all theſe caſes the duty grows due by the very lading on ſhip-board for that purpoſe; and that appears by the remedy or penalty that is given for it, viz. that if any merchandize, &c. ſhall at any time hereafter be ſhipped, or put into any boat or veſſel, to the intent to be carried into the parts beyond the

ſea, &c. the cuſtomes not paid or the collector agreed with, &c. they are forfeited; ſo that the very lading them in any ſhip, or in any boat to that purpoſe, intitles the king to the duty, and his remedy for it by forfeiture of the goods.

Upon this that hath been ſaid it appears, not only when the duties outward are due, but alſo when they are not due.

If goods outward-bound are loſt, or periſh, by the ſea or fire, or pirates, or other caſualty, yet the duty if unpaid is in ſtrictneſs recoverable, or if paid, it cannot be in ſtrictneſs demanded back again. But in ancient time, the king uſually granted his privy ſeal in ſuch caſes, to enable them to ſhip out as many goods cuſtom free in the ſame port. But at this day, and for many years in the acts of ſubſidy of tunnage and poundage, there is a ſettled proviſion for that purpoſe by the act itſelf.

If a merchant import or unlade foreign goods, and pay cuſtomes inward, and preſently reſhip them again to be exported, in ſtrictneſs of law he ought to pay his cuſtomes outward. But by the favourable rules confirmed by act of parliament, in the book of rates he hath allowance, in ſome caſes of the whole, in ſome of the half ſubſidy, as the caſe requires.

If any man ſhip forth goods from one port to another in this kingdom, there is by law no ſubſidy or cuſtome due, and ſo was the conſtant uſage when the great cuſtomes were only had, as appears by ſeveral writts to the cuſtomers of the ports where the goods are landed. But then the courſe is, and always hath been, for the exporter to take a coaſt cocquett, and give ſecurity for the diſcharging the ſame accordingly; and upon the bringing of a certificate from the port of unlading to the cuſtomer of the port, where the goods were laden aboard, thereupon his port-bond is to be cancelled. *Vide* ſtat. 33. H. 8. cap. 7. and 2. E. 6. cap. 37. for braſs and bell-mettall. *Clauſ.* 20. *E.* 3. *p.* 1. *m.* 16. *V. Clauſ.* 7. *E.* 3. *p.* 1. *m.* 4. cuſtomes paid and repaid upon certificate.

II. As to the cuſtomes inward, and the times when ſuch cuſtomes or ſubſidies are due, the beſt meaſures of the time when theſe duties grow due are theſe:

(1.) They muſt be imported from ſome place beyond the ſeas; for if they be carried only from one port to another within the kingdom, this is not any importation to intitle the king to cuſtomes. And therefore, though foreign goods be imported into the port of *London*, and there duly pay their cuſtom, and yet afterwards depart with their goods to the port of Hull, they are not to pay another cuſtome at Hull. But then by the ſtatute of 3. H. 7. cap. 7. they muſt bring a certificate of the cuſtome paid, and particulars of the goods. Otherwiſe the goods are forfeited if

landed

landed at Hull, the cuſtomes there not paid. But if it be tranſported from one creek or part of the ſame port to another part of the ſame port, there needs no ſuch certificate, for the ſtatute ſpeaks of another port.

(2.) The goods ought to be imported *by way of merchandize*; for if they come in by reaſon of foul weather, or to eſcape pirates, or to take in freſh water; yea, though they unlade part of their lading or all of it upon ſuch an extremity; yea, yet farther, though they ſell within the port ſome part of their lading for the defray of their caſualties, as the mending their ſhip and buying of victuals, even by the common law they were to pay no cuſtome nor ſubſidy for any more than what was ſo actually ſold. And this appears by divers precedents, as well before as ſince the ſtatute of 28. E. 3. cap. 13. *Vide Clauſ.* 43. *m.* 30. *pro mercatoribus Almaniæ* Spruce and Holland. And accordingly if they were wrecked upon the Engliſh coaſt, no cuſtome by law is due for more than is ſold. *Clauſ.* 50. *E.* 3. *p.* 2. *m.* 8. *Clauſ.* 13. *R.* 2. *p.* 2. *m.* 13.—*Burgenſibus Berwick Rot. Parl.* 50. *E.* 3. *n.* 3. *Vide* 14. *E.* 3. *c.* 21. 34. *E.* 3. *c.* 19. 38. *E.* 3. *c.* 8.—*Entryes in outre noſme* 13. *R.* 2. *c.* 9. 3. *H.* 7. *c.* 7. 1. *H.* 8. *c.* 5. 2. *E.* 6. c. 32.

(3.) At common law if a merchant had voluntarily come into any port, and broke bulk and ſold or unladed any part by way of merchandize, he ſhould have paid his cuſtome for the whole ſhip's lading; becauſe by this act the merchant did in effect declare he came in by way of merchandize and trade. But, by the ſtatute of 28. E. 3. cap. 13. confirmed by the ſtatute of 20. R. 2. c. 4. that law was altered; and though the merchant came in voluntarily and broke bulk and ſold or unladed part, he ſhould not be enforced to pay cuſtome for the reſt of the ſhip's lading. And at this day by the firſt rule of the book of rates * that law is moſt effectually ſettled, viz. *every merchant ſhall have free liberty to break bulk in any port allowed by law, and to pay cuſtom and ſubſidy for no more than he ſhall enter upon land.*—But theſe laws did not extend to priſage; and therefore at this day, if bulk be broken, priſage ſhall be paid for the whole ſhip's lading, as hath been reſolved, as appears before in the chapter of priſage.†

(4.) If clothes or other goods are exported out of Ireland into England, they ſhall pay a cuſtome outward in Ireland, but no cuſtom inward in England, no more than in a caſe of tranſportation from a port in England to another port in England; becauſe though it be a differing kingdom, and therefore he ſhall pay there a ſubſidy outward, yet it is part of the dominions of

* At the end of 12. Cha. 2. c. 4.—EDITOR.

† Ante, page 122.—EDITOR.

the

the crown of England, and therefore ſhall pay no ſubſidy here inward. *Rot. Parl.* 51. *E.* 3. *n.* 71. But if a merchant pay his ſubſidy or cuſtomes outwards in Scotland upon goods tranſported from thence by ſea into England, he ſhall pay cuſtome or ſubſidy inwards here, becauſe they are different and independent kingdoms and dominions. But goods tranſported from Berwick to Newcaſtle or any other port pay neither duties inward or outward, but are to be diſcharged by certificate by virtue of the ſtatute of 3. H. 7. c. 7. For Berwick, though part of Scotland, is by conqueſt annexed to England, and as to moſt purpoſes part thereof.

(5.) If goods are taken as lawful prize upon the ſea, and imported or brought into an Engliſh port, theſe prize goods ſhall pay cuſtomes inward; and accordingly it hath been reſolved.

(6.) When goods are imported *by way of merchandiſe* into any port of England, great queſtion hath been heretofore made, when the cuſtome and ſubſidy becomes due, viz. whether by the coming into the narrow ſeas being the king's dominions, or whether by coming into the port, or by breaking of bulk, or entering the goods, or landing the goods.

In Michaelmas 4. Car. in the exchequer there was a notable caſe touching this matter by Engliſh bill between the lady Swinerton executor of Sir John Swinerton and Sir John Woleſtonholme and others, which was to this effect. King James, having by act of parliament the ſubſidy of tunnage of wines, and having by letters patents ſet a farther impoſt upon wines, by indenture 16. May c. 9. Jac. granted unto ſir John Swinerton the ſaid ſubſidy and impoſt, which at any time after the feaſt of St. Michael laſt paſſed had happened, come, ariſen or grown due, or ſhould or might or ought to happen, ariſe, come, grow, renew, be due or payable to the king, his heirs or ſucceſſors, of any ſweet wines, which, at any time or times within or during the time or term therein mentioned, had been or ſhould be brought from any parts beyond the ſeas into the port of London or members thereof; to hold from the Annunciation next following for nine years. Sir John made the plaintiff his executor, and then dyed, upon the 25th of March 1623, which was the laſt day of the term. Divers ſweet wines were imported into the port of London, ſome whereof were not entered till after the ſaid 25th day of March, and ſome were entered in the cuſtom-houſe upon the ſaid 25th day of March, but not landed till after. So though the queſtions upon the caſe were four, yet they were in effect but theſe two, viz.

1ſt. Whether the lady ſhould have the ſubſidy and impoſt of the wines imported within the term, but not entered till after the term?

2d.

2d. Whether ſhe ſhould have the ſubſidy and impoſt of the wines imported and entered within the term, but not landed till after the term?

In this caſe theſe points were reſolved:

1. That if the grant of Sir John Swinerton had been of all the impoſts and ſubſidy of ſuch ſweet wines, as ſhould be imported within the port of London within the ſpace of three years, to be accounted from the Annunciation next after the indenture; in that caſe if the wines were imported within the term the leſſee ſhould have the duties, although they were neither entered nor landed within the term; becauſe the grant carries the duties of theſe wines if imported within the term, though the duty became not due till after the term.

2. But according to the ſpecial penning of this demiſe it carries only ſuch duties as grew due within the term; and therefore though the wines were imported within the term, yet if the duty do not riſe within the term, theſe duties do not paſs; and therefore it is neceſſary to enquire when theſe duties grow due. If by the importing, or at leaſt by the importing and entering, then they would belong to the farmer; becauſe imported, and ſome imported and valued within the term. But if the duty grows not due until the unlading, then they belong not to the farmer, becauſe the unlading was not till after the term.

It was reſolved by the court againſt the plaintiff by the opinion of Walter chief baron and Trevor againſt the opinion of Denham, viz.

1. That the duty of tunnage by the act of ſubſidy, nor the duty of impoſt (if it were a duty) doth not ſettle by the importation.

2. That theſe duties grow not due by the entry of the wines in the cuſtom-houſe; for notwithſtanding the importation into the port, and notwithſtanding the entry of them, yet the merchant may carry out the goods again for another port.

3. But that thoſe duties grow due by the unlading, and not before.

And the reaſons given were,

1. As to the impoſt. The kings letters patents create no duty, neither are the goods charged; but all that can be done for the recovery of the impoſt is only to hinder the merchant from unlading till the impoſt paid or ſecured.

2. As to the ſubſidy, the act gives not to the king any duty by the importation; but gives the king a forfeiture, if the goods be unladen the ſubſidy not paid, And therefore in conſtruction

ſtruction of law, the law gives it the king, when it gives him the remedy, viz. by the unlading and not before, and accordingly it was decreed.

Now to ſay what I think of this matter;

1. As to the ancient cuſtomes, as well great as ſmall, it ſeems very plain,

1. That the duty did not grow due merely by the importation into the narrow ſeas, though part of the king's dominions; neither was that ever practiſed; for then the king ſhould be intitled to the cuſtom of all the goods that paſſed between Spain and the Netherlands, although they never intended to make any port in England, for which there is neither colour nor practice.

2. That the duty is not due only by the coming of a ſhip into an Engliſh port; for ſo he might do for ſafeguard, or to ſtay for a wind, and yet without any intention of merchandiſe; and the cuſtomes are due only from ſuch goods as are imported for merchandiſe, and not otherwiſe.

3. But if a ſhip imported any goods at common law into any Engliſh port *by way of merchandiſe*, when that doth once appear, the king by the common law was intitled to the cuſtomes of all the goods imported in ſuch a ſhip in ſuch a port; for the old grant of the old cuſtomes is of all the goods imported *by way of merchandize*, and accordingly moſt certain was the practice at the common law.

4. But becauſe the law neither can take notice of intentions nor try them, without ſome overt act, there was in this caſe an overt act required to make it out, that the goods were imported by way of merchandiſe; and that overt act was ſale of part of the goods without any conſtraint; and this is called breaking of bulk, and at common law ſuch breaking of bulk were taken out *not* in a way of trade, but for neceſſity, as to repair or victual the ſhip upon an emergent neceſſity, this was not ſuch a breaking of bulk, as intitled the king to the cuſtomes of the whole lading; for it did evidence an importation of the goods to the intent to trade.

5. But though this were the common law, yet by the ſtatute of 28. E. 3. c. 13. the common law was changed in this point; and the merchant importing and ſelling part is excuſed from payment of cuſtomes for more than he ſells; though this extended not to priſage, as is before ſhewn.

And thus much touching the time when the duties of cuſtomes became due.

2. Touching the ſubſidy of poundage, the words of the act, that grants or qualifies the grant, muſt determine. The uſual manner of the grant is thus much of all wines, which ſhall *come*

or

or be brought into any of the ports of this kingdom by way of merchandize, &c. Upon this grant, if it went no further, I ſhould think it very plain,

1. That ſuch an act creates a duty in the king, and he may originally ſue for the duty itſelf as well as for the forfeiture, for landing goods the duty not paid.

2. That this gives the king this duty of all the goods imported by way of merchandize; and therefore, as in the former caſe of cuſtomes, ſo in this of the ſubſidy, if once bulk be broken and part ſold, the king's farmers were entitled to the ſubſidy of the whole ſhip's lading; for now it appears by an overt act, that the whole lading was imported for that end.

But to remedy this miſchief, in the firſt rule of the book of rates this is corrected; for it is thereby enacted, that the merchant ſhall pay ſubſidy for no more than he lands. So that at this day, upon this reaſon, the duty of the ſubſidy commenceth only by the unlading, and not by the importation by way of merchandize; for no duty is due for any more than what is unladen.

Touching the commencement of the duty of import, I need not ſpeak; for the truth is, it created no duty, as hath been ſhewn; and therefore it is impertinent to examine the time when it attached.

CAP. XXI.

Concerning the entry of goods inwards and outwards, and how to be made.

THE entry of goods is nothing elſe, but a note in writing delivered in by the merchant or thoſe employed by them unto the king's officer of the cuſtomes, containing the quantity either in weight or meaſure, and the marks and kinds of the goods by him imported or exported; to the end the king may be aſcertained what duty to expect, and the merchant may be enabled either to pay or ſecure or compound that duty, ſo that he may lade or unlade his goods ſafely without forfeiture for want of due anſwering the cuſtomes or ſubſidies due for the ſame. If the merchant be exactly certain of the quantity and nature of his goods, (which is very difficult in caſe of goods imported) he may enter them at his peril. But then if he lands his goods, and the officer upon view or weight find him to exceed what is ſo entered, it will in ſtrictneſs be a forfeiture of what exceeds his entry; for he hath neither paid nor compounded for that ſurpluſage. The juſt and ſafe and uſual way, therefore, for preventing of loſs to the king and

and forfeiture to the merchant, is to enter them by conſent or eſtimate; and if they ſhall amount to more upon ſight or weight when landed, that then he will be anſwerable for the ſubſidy or cuſtom of the ſurpluſage. For this is a good agreement with the cuſtomer or comptroller, as it is reſolved Commentaries 1. Fogaſſa's caſe; and thereby the merchant ſaves the forfeiture of his goods: for the cuſtomer ought upon ſuch entry to grant the merchant a bill of ſufferance or ſight, to permit the merchant to land or lade his goods without ſeizure. And on the other ſide the king is ſecured his duty; for the entry being thus ſpecial, all the officers are allarmed to ſee the goods weighed or meaſured or examined, and by that means the ſhort entry at firſt is made good by a poſt entry; and the king by that means ſecured of his duty for what is ſhort entered at firſt; for the entry is that, whereby the king's duty is anſwered, and according to which the king's officers of his cuſtoms are to account.

We have ſeen what the entry of goods is, and why firſt conſtituted. But for the explication of this buſineſs we are to conſider, 1. Of what kinds ſuch entries are. 2. By whom to be made. 3. By what laws. 4. In what manner.

Touching the kinds of ſuch entries they are generally of two ſorts, viz.

(1.) The entry of ſuch goods, whereof in truth no cuſtom is or can be due, viz.

When foreign goods already cuſtomed in one port are ſhipped to another port in the realm, then by the ſtatute of 3. H. 7. cap. 7. there ought to be brought a particular certificate of the goods ſo cuſtomed in one port to the cuſtomer of the other port of unlading; or otherwiſe muſt pay his cuſtomes again at the port of unlading; or if he lands them, ſuch cuſtomes unpaid or no ſuch certificate made, the goods are forfeited.

Or where native cuſtomable goods are ſhipt in one port to be unladen in another port in the kingdom, the merchant ought to give in a particular of the goods in the lading port, and to take coaſt cocquet for the clearing of thoſe goods, and give ſecurity for the carrying of thoſe goods to the port deſigned, which are called port-bonds; which are to be diſcharged, upon the bringing back of a certificate from the unlading port that the goods are there unladen.

(2.) The ſecond ſort of entry is for theſe goods, whereof cuſtoms outwards or inwards are due and payable. And theſe again are of two ſorts, either a pre-entry or a poſt-entry.

1. The pre-entry is that entry, which is made before the goods are laden aboard if to be tranſported, or before the goods imported

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be unladen, containing the certain content and natures of ſuch goods, to the end the king may be anſwered his duties, and the merchant ſaved from the forfeiture, by payment of his cuſtomes, or agreement with the cuſtomer and comptroller for the ſame; for if they be laden aboard or unladen without ſuch payment or agreement, the goods are forfeited.

And this again is of two ſorts, viz. the entry by the merchant or owner of the goods, and the entry of the maſter or purſer of the ſaid ſhip or veſſell.

Touching the pre-entry by the merchant, this is of two kinds alſo, viz. an entry at ſight, or an entry at the perill of the merchant.

The former is a generall entry of ſuch or ſuch goods by gueſs or eſtimate, with an agreement with the cuſtomer, if, upon ſearch or weight, it ſhall be found more or other than what is ſo entered, to be rateably anſwerable for it. And upon this the cuſtomers do, and ought to grant a bill of ſufferance to unlade thoſe goods; and if upon the ſearch or weight, it ſhall prove to be more or of another nature, then the merchant is to make his poſt-entry of what is omitted, and anſwer the cuſtome and duties accordingly. By this means the merchant is ſecured from the forfeiture of his goods, though laden or unladen before the full cuſtome paid, and the king ſecured his duty.

The ſecond ſort of pre-entry is, when the merchant enters his goods at his perill, wherein the danger is his; for if in truth that entry be not full and perfect, and the goods entered were laden aboard, or inward are unladen, and it be diſcovered that there is a miſ-entry, and thereupon the officer ſeizeth, the merchant loſeth the goods whereof the cuſtomes are not in truth anſwered upon his firſt entry. But though this pre-entry be ſaid at the perill of the merchant, yet if, before the ſhipping of the goods outward bound, or unlading of the goods inward bound, the merchant finds his error, he may ſupply it with a fuller entry. Nay, if the goods be ſo ſhipt or unladen, yet before ſeizure made of the overplus, the merchant may rectify his entry by a poſt-entry, and ſo ſave the forfeiture of the ſurpluſage of the goods not before entered. And ſo is the conſtant practice; for as long as there is fair dealing in the main, ſo that the king is truly anſwered the duty, the merchant ought not to be catched or ſurpriſed for unwilling miſtakes; and it appears to be ſuch, when the merchant of himſelf rectifyes it before a ſeizure.

And thus much for the pre-entry of the merchant.

Touching the pre-entry of the maſter, or purſer, or other mariner having the government of the ſhip, the maſter or chief rector of the ſhip, he hath the bills of lading, and by that means

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he hath a kind of controul upon the merchant. And therefore to the end the king may have all the means poſſible, to prevent defrauding of his duties, the maſter, purſer, or governor of the ſhip is to give an account of the goods under his charge; and by the ſtatute of 1. Eliz. cap. 11. he is to be examined upon his oath touching the goods in the ſhip; and if he ſhall refuſe, or not truly anſwer, he is ſubject to the penalty of 100*l.* And by the ſtatute of 13. and 14. Car. 2. touching the cuſtomes, the maſter or purſer, is bound upon oath to make a juſt and true entry of the burthen and lading of every ſhip inward and outward, and of divers other particulars in that act mentioned, upon pain of 100*l.* And thus much concerning the pre-entry.

2. The poſt-entry is, as hath been ſhewed, when the merchant, not having made either a true or full entry before, but either made his entry upon ſight, or, if his entry be peremptory, yet afterwards diſcovering his error, makes a full entry of his goods imported or exported before ſeizure; and this is called a poſt-entry.

If the merchant makes his entry at ſight, and agrees if there be more he will ſupply his entry, and pay the ſurpluſage of the duty, this prevents all forfeiture; for he always may have in ſuch caſe a bill of ſight or ſufferance to land his goods; and if upon ſearch or weight, they appear to be more, he may of courſe make his poſt-entry of what was omitted in the former entry. But if he makes his entry at his peril, though before ſeizure he may ſupply the defect of his former entry with a new or poſt entry, and ſo ſave his goods; yet if ſuch poſt-entry in the caſe of ſuch an entry at peril, come not till after ſeizure, the poſt-entry in that caſe comes too late to ſave the forfeiture for the king, and the informer is intitled to the ſurpluſage uncuſtomed by the ſeizure; and the merchant would have deceived the king if he could.—And thus much concerning the kinds of entries, and the grounds upon which they are made.

Now touching the quality of the entries by the merchant, this is required generally in them, that they be true, viz.

1. True in reſpect of the nature or quality of the goods, whereof before.

2. True in reſpect of the owners or proprietors.

By the ſtatute of 3. H. 7. cap. 7. it is enacted, that no merchant denizen nor ſtranger enter any goods exported or imported, but in the name of the true merchant owner of the ſame, upon pain of forfeiture of the goods.

By this act, if one Engliſhman had entered goods in the name of another Engliſhman, or one alien had entered in the name of another, though the king thereby had not been at any prejudice in his cuſtomes,

cuſtomes, the goods had been forfeit, as well as if an alien that pays greater cuſtomes had entered his goods in the name of an Engliſhman.

By the ſtatute of 1. H. 4. cap. 5. this is rectified; and it is enacted, that an Engliſhman may enter in the name of another Engliſhman, or one ſtranger in the name of another ſtranger.

But no ſtranger or denizen ſhall enter in the name of another, whereby the king ſhould loſe his cuſtomes or ſubſidies; nor no ſubject free of priſage but butlerage ſhould cuſtome in his own name the goods of another, upon pain of forfeiture of the goods and other penalties.

By the ſtatute of 2. E. 6. cap. 22. the ſtatute of 1. H. 7. is confirmed.

But by the ſtatute of 1. Eliz. cap. 11. it is again enacted, that no perſon enter any goods imported or exported in the name of any other perſon than in the name of the very owner thereof, not being ſold before ſuch entry, or before the arrival of the wares from beyond the ſea, upon pain of forfeiture. So that this ſtatute ſeems to prohibit one Engliſhman to enter in the name of another, or one alien to enter in the name of another alien, though the king be at no loſs thereby, as well as ſuch an entry by an alien to enter in the name of an Engliſhman, or ſuch other entry whereby the king is at a loſs in his duties. And this ſtatute ſtands in force at this day. But yet the practice by indulgence and connivance hath run contrary; for I have not known any queſtioned for a falſe entry in another's name upon this ſtatute, unleſs by ſuch entry the king hath been at a loſs in his cuſtomes; as where one ſubject to alien's duties enters in an Engliſhman's name, or where one not privileged from priſage or cuſtomes enters in the name of one that hath that privilege in the whole or at leaſt in ſome part.

CAP. XXII.

What ſhall be ſaid a ſhipping to entitle the king to the ſubſidies or other duties of things imported; and what an unſhipping, &c. to entitle the king to the duties inwards.

I HAVE before ſhewn, that as things ſtand at this day by force of the act of tunnage and poundage of 12. Cha. 2. and the rules of the book of rates which were part of that, as no duty outwards grows due before ſhipping, ſo no duty inwards grows

grows due before unlading. So that the unlading is the beginning of the duty inward at this day, and during the continuance of the ſubſidy of tunnage and poundage now in force.

Although, as I have before obſerved, the king hath the duty itſelf veſted in him by the act, for which he may ſue without demanding the penalty, yet the ſtatute hath provided a more effectual remedy for the king's duty, viz. forfeiture of thoſe goods for which cuſtome is due but ſubſtracted. And the ordinary means at this day for the king's relief in caſe of ſuch ſubſtraction is to inform for the forfeiture of thoſe goods of which the cuſtome is ſo ſubſtracted.

The great clauſe upon which this forfeiture depends is this*: "If any wines, goods, or other merchandize, whereof the "ſubſidies aforeſaid are or ſhall be due, ſhall at any time after "be ſhipped or put into any boat or veſſell, to the intent to be "carried into the parts beyond the ſeas, or elſe be brought "from the parts beyond the ſeas into any port, place or creek "of this realm, or other your Majeſty's dominions, by "way of merchandize, and unſhipped to be laid on land, the "the ſubſidy, cuſtomes and other duties due or to be due for the "ſame not paid or lawfully tendered to the collector thereof or "his deputy, with the conſent and agreement of the comptroller and ſurveyor there or one of them at the leaſt, for agreed "with for the ſame in the cuſtom-houſe, according to the true "meaning of this act; that then from the ſaid 24th of June "all the ſame wines, goods and merchandizes whatſoever ſhall "be forfeit to your Majeſty, the one moiety of the rate thereof "to your Majeſty, and the other moiety to him or them that "will ſeize or ſue for the ſame."—By this clauſe all the great queſtions concerning the ſubſidy of tunnage and poundage are guided; for during the continuance of this ſubſidy no other cuſtomes are on foot, but all ſuſpended, as hath been ſhewn by the expreſs proviſion of the laſt rule in the book of rates. And therefore I ſhall ſomewhat largely examine this clauſe and the ſeveral parts of it.

I. In reference to cuſtomes outwards there will be theſe queſtions:

(1.) What ſhall be ſaid a ſhipping or putting into any boat, to the intent to be carried into the ports beyond the ſea.

(2.) What ſhall be ſaid goods or merchandizes ſo ſhipt, whereof any ſubſidy ſhall be due.

II. In reference to goods imported:

* 12. Cha. 2. c. 4. ſ. 3.——EDITOR.

(1.) What

(1.) What ſhall be ſaid goods or merchandizes imported, whereof any ſubſidy is or ſhall be due.

(2.) What ſhall be ſaid an unſhipping to be laid on land.

III. In referrence to the payment:

(1.) What ſhall be ſaid a payment, what a tender, what an agreement within the intent of this act.

(2.) Who ſhall be ſaid a collector within this act.

IV. In referrence to the forfeiture:

(1.) What the forfeiture is, or when, or how it begins, or is conſummate.

(2.) What is a ſeizure, and who a ſeizor, within this act, to to be intitled to the moiety.

I. Touching the firſt of theſe, viz.

(1.) What is a ſhipping to be tranſported beyond the ſea.

If goods are laid into any boat or lighter or bottom, to be carryed to any ſhip in or out of the port, to be from thence carryed into the parts beyond the ſea, the firſt lading into that boat or veſſell the cuſtomes unpaid gives the forfeiture.

If goods are laden into any port in England to be tranſported into Ireland or Scotland, this is a loading to be tranſported beyond the ſea; though Ireland be part of the dominions of England; becauſe it is a different kingdom, and the cuſtomes are due here, though the cuſtomes being paid here, they ought not to be charged with other cuſtomes in Ireland.

If goods are laden aboard in any port in England, Wales or Berwick, they are not to pay any cuſtomes or duties outward or inward. But then they ought to have a coaſt-cocquett, and give ſecurity to unlade at ſuch a port, and bring back to the lading port from the port of diſcharge within ſix months a certificate that the goods are accordingly unladen there. *Vide* ſtatute 14. Car.* concerning the cuſtomes.

(2.) What ſhall be ſaid goods or merchandiſe.

The wearing-apparell of any paſſenger, not the goods or furniture of any embaſſador or ſervant of the king or other forreign miniſter for his ordinary uſe, and not for traffick or merchandiſe, are not goods or merchandiſes chargeable with theſe duties. Yet to prevent deceit on the one ſide or danger of ſeizure on the other ſide, theſe goods are not laden nor unladen without a bill of ſufferance from the officers of the cuſtomes. The furniture, victuall, table, ammunition, or apparell, for

* 13. and 14. Cha. 2. c. xi. ſ. 7.——EDITOR.

the

the ordinary uſe of the ſhip, and not for trade or ſale, are not goods or merchandiſe chargeable with cuſtome outward or inward.

II. In referrence to goods imported:

(1.) What are goods or merchandiſes imported by way of merchandiſe.

Something of this hath been ſaid immediately before, which need not be repeated.

If a ſhip and goods be driven into a port by foul weather or by ſome leak of the ſhip, whereby the merchants are enforced to land their goods for ſaving them, or the neceſſary repair of the ſhip, but with intent to re-lade them again; this is no ſuch unlading as to intitle the king to the cuſtomes. Yet, for the ſecurity of the king againſt deceit and the merchant from the danger of ſeizing, it is ſafe and fit for the king's officers to be acquainted with the unlading, and to ſuffer a bill of ſufferance to be gotten, if the exigence of the occaſion will permit.

If goods be taken upon the ſea by way of repriſal or priſe, and brought into a port in England, they ought to pay the duties; for they are imported for ſale, and ſo by way of merchandiſe. And ſo it was reſolved in 38. 39. *Eliz. in ſcaccario, n.* 67. *Howell* and *Hall.*

The ſame law ſeems to be for goods taken up by the lord of any manor or other ſeized as wreck, or ſeized upon the ſea by the admirall or his deputy, as flotſon, jetſon and lagon.

The priſage of wines, viz. a tun before the maſt and a tun behind the maſt, ought not to pay any tunnage or other ſubſidy, though the king hath lett them to farm. For a cuſtome ſhall not be paid of a cuſtome to himſelf; and though the priſage be lett to farm, the farmer hath it ſtill in right of the crown, and therefore he ſhall pay no tunnage for it. And accordingly it hath been often reſolved. But otherwiſe poſſibly it may be, if priſage be claimed by a ſubject by preſcription or charter

The freemen of London and barons of the cinque ports ought to pay full cuſtome and ſubſidy of their wines, though they have a diſcharge of priſage by the king's charter, and ſo in manner claim the ſame under the king's grant. And this is clear, becauſe though it be a grant by the king, yet it is a grant by way of diſcharge.

(2.) What ſhall be ſaid to be an unſhipping to be laid on land.

If a ſhip laden with ſalt or other foreign goods come into any port of England, and there ſell her lading to any other ſhip in the ſame port to be tranſported beyond the ſea, and accordingly the ſame is unladen into that other ſhip and tranſported; though theſe goods were never brought on land, yet,

in

inaſmuch as this is done in the port, this is an unſhipping to be laid on land, within the conſtruction of this act, and the king ſhould have a double cuſtome, viz. a cuſtome inward, and a cuſtome outward in that caſe. And accordingly it was reſolved, 34. *Eliz. in ſcaccario*, in a caſe cited *per* Walter in Swinerton's caſe. *Vide* Comment. 7. *per* Gawdy.

If a ſhip come into a port and unlade part of her lading, to be diſpoſed of by way of merchandiſe, at common law cuſtome was to be paid for the whole lading; but at this day, no more ſhall be cuſtomed but what is landed, as hath been ſhewn in the laſt chapter.

If goods be unladen by miſtake of the merchant, his ſervant or mariner, this is not ſuch an unlading as will give a forfeiture, if the cuſtomes were not paid for the ſame.——The caſe was a merchant having conſigned unto him, a barrell of thread in one ſhip, and a barrell of coarſe inckle in another, but the marks in the invoice miſtaken, he enters the inckle, and pays his cuſtom for it, but by the miſtake of the marks, takes up the thread inſtead of the inckle, which being landed and opened by the land-waiter, appeared to be thread, and was thereupon ſeized as forfeited. But becauſe it appeared to be a mere miſtake, it was ruled upon evidence to be no forfeiture. But if upon the circumſtances it had appeared to be done by deſign, to ſave the cuſtomes of thread, which were greater than the others, then it had been a forfeiture. And therefore the circumſtances govern in this caſe.

By the 27. E. 3. ſt. 2. cap. 19. no merchant is to loſe or forfeit his goods, for the treſpaſs or offence of his ſervant, unleſs it be done by the command or procurement of his maſter, or that he hath offended in the office in which his maſter hath ſett him, &c. and moſt of the pleas in the time of E. 4. H. 6. &c. in diſcharge of forfeitures for non-payment of cuſtomes, were grounded upon this act.

III. In reference to the payment of cuſtomes:

(1.) What ſhall be ſaid an agreement within this act.

If the merchant having a parcell of goods to unlade which pay cuſtomes by weight; but before he doth know the certain weight thereof, and before the goods unladen, it is agreed between the merchant and the collector, with the conſent of the comptroller, that he will pay what is due, when the ſame is weighed; and thereupon the goods are unladen, though without a bill of ſufferance, and ſeized; this is a good agreement within the act to excuſe the forfeiture, and accordingly adjudged in the Comment. 1. Fogaſſa's caſe, becauſe reducible to certainty.

(2.) Who ſhall be ſaid ſuch an officer with whom ſuch agreement may be made.

An unlading of goods, by the conſent of the land-waiter, tideſman, or ſearcher, is not ſuch an unlading by agreement required in the act; for theſe are not officers authorized for that purpoſe; for the ſtatute is, that the agreement ought to be with the collector by the conſent of the comptroller and ſurveyor or one of them—And here note, that in every port of England there are a collector * and a comptroller, but only in the port of London a ſurveyor; and theſe are officers by patent of the king.

If there be a collector or comptroller *de facto*, though he be not ſuch *de jure*, yet an agreement with ſuch an officer is good; for the merchant cannot take notice of the title of the officer.

A collector in the port of S. makes B. his deputy, who makes C. his deputy. A merchant importer agrees with C. and the comptroller to anſwer all cuſtomes which ſhould be found due upon the view of the goods. Ruled, that this is a good agreement, though at firſt uncertain, and though made with one that was a deputy of a deputy.

IV. As to the point of forfeiture.

(1.) Though a title of forfeiture be given by the lading or unlading, the cuſtome not paid, yet the king's title is not compleat, till he hath a judgment of record to aſcertain his title; for otherwiſe there would be endleſs ſuits and vexations; for it may be, ten or twenty years hence there might be a pretence of forfeiture now incurred.

The king's judgment is upon an information, which may be either for the king alone, or for the king and informer; and theſe informations are of two kinds, viz.

An information without a ſeizure, where the ſurmiſe is, that goods uncuſtomed came to the hands of the defendant; wherein if the defendant be convicted, he anſwers the value of the goods.

Or elſe an information upon a ſeizure, which is againſt no perſon certain; but the party, that ſeizeth the goods as uncuſtomed, prefers an information in the exchequer, praying that the goods may remaine forfeit; upon which there goes out a writt to appraiſe the goods, and upon the return of the appraiſement proclamation is made, that if any man will come in he ſhall be heard. If upon or before this proclamation, the owner will come in and claim property and plead, he may thereupon have the goods

* Antiently the *cuſtomer* and *collector* were one and the ſame officer; and ſo they ſeem to have been in lord Hale's time. But now in ſome ports, as in Briſtol, there is both a cuſtomer and a collector. See Crouch's Compleat Guide to Officers of the Cuſtoms 2. and 4.---EDITOR.

delivered

delivered upon ſecurity, if the ſame be *bona peritura**. But if none come in to plead to their forfeiture, judgment is given that the goods remain forfeited. And thus judgment concludes the party's intereſt; and it is but reaſonable it ſhould do ſo; for he hath notice of the ſuit,

1. By the ſeizure.

2. By the appraiſement, which is publickly done in the cuſtom-houſe by the king's writ.

3. By the proclamation in that court, which is known to be the public place, whereunto all matters of this kind do come; for no information of this nature lyes in any other court in England. The king may inform upon a *devenit* in what court he pleaſes. But there cannot be an information upon a ſeizure thus to condemn goods by proclamation, but only in the court of exchequer; and the reaſon is, becauſe upon all ſuch ſeizures every perſon concerned may have and know a certain place to reſort unto for his remedy in this kind.

(2.) Who may thus ſeize and inform upon a ſeizure.

At common law any perſon might ſeize uncuſtomed goods to the uſe of the king and himſelf, and thereupon inform for a [illegible]. But yet if A. ſeize goods uncuſtomed, and then B. ſeize them for the ſame cauſe, he that firſt ſeizeth ought to be preferred as the informer. And therefore if B. that ſeized after, firſt inform, and A. alſo inform, A. may be admitted to interplead with B. upon the priority of the ſeizure, before the merchant ſhall be put to anſwer either.

But now by the ſtatute of 14. Car. † for regulation of all cuſtomes, none are to inform for non-payment of cuſtomes, &c. but ſuch as are authorized by the treaſurer, chancellor of the exchequer, or farmer of the cuſtomes.

If the king grant to the admirall all derelicted goods found in the ſea, fliotſon, jetſon, &c. and a merchant exports tinn uncuſtomed; and to ſave the forfeiture and ſeizure caſts it overboard near the port; though this as to ſome purpoſes be derelict jetſon, and therefore if there were no more in the caſe would belong to the admirall againſt the king by virtue of this grant, yet, inaſmuch as the king hath a title to this as forfeit for non-payment of cuſtomes, which title is not granted over, the king ſhall hold thoſe goods notwithſtanding the grant to the admirall. And upon this account a prohibition was granted to the admirall court in this court ‡ to ſtay their proceeding there to condemn

* See as to this matter 13. and 14. Cha. 2. c. 11. ſ. 30.——EDITOR.

† See 13. and 14. Cha. 2. c. 11. ſ. 15. and 17.——EDITOR.

‡ The MS. is deficient in not mentioning what court. But the court of exchequer is plainly meant.——EDITOR.

thoſe goods as jetſon for the duke of York, lord high admiral. P. 17. Car. 2.

And thus much ſhall ſuffice for this clauſe of the act of tunnage and poundage, which is of daily uſe, and explains much of this buſineſs.

CAP. XXIII.

Concerning the times and places for lading and unlading goods.

BY the ſtatute 1. Eliz. cap. 11. every perſon that is to lade or unlade any merchandize into or out of any ſhip between the firſt of March and the laſt of September, ought to do it between ſun riſing and ſun ſetting, and from the laſt of September till the firſt of March, between ſeven in the morning and four in the afternoon, upon pain of forfeiture of the goods.

After due entry and agreement made with the cuſtomers, a ſhip, inwards bound, between the laſt of September and the firſt of March, unlades her goods into a lighter about twelve of the clock at noon, which come to ſhore *aquâ inde refluxâ* about two of the o'clock, and the goods are unladen after four o'clock. Ruled, that, inaſmuch as the bringing to ſhore *aquâ inde refluxâ* was before four of the clock, this was a diſcharging and laying on land before four of the clock within the ſtatute; and ſo the forfeiture ſaved. *M.* 33. 39. *Eliz. in ſcaccario.* Howell and Hall, Crook *n.* 67. *

As that ſtatute provides for a forfeiture upon the merchant in caſe of ſhipping or unſhipping at prohibited times, ſo the ſtatute of 14 Car. 2. † gives a penalty of 100l. againſt the wharfingers and bargemen.

The ſtatute of the 1ſt Eliz. as it limits the times of lading and unlading, ſo it limits the place under the like penalty of forfeiture of the goods, viz. at ſuch keys, wharfs and places as the queen ſhall appoint by commiſſion before the firſt of September, in the ports of London, Southampton, Briſtoll, Weſtcheſter, Newcaſtle, and the ſuburbs thereof, and in ſome open place, key, or wharfe, in all other ports, creeks, havens, or roads, Hull only excepted, where a cuſtomer, comptroller, and a ſearcher, or the ſervants of ſome of them, have been by the ſpace of ten years laſt paſt accuſtomably reſident ‡.

* Leak and Michel for themſelves, and the queen v. Howell and Hall Cro. Eliz. 513.---EDITOR.

† See 13. and 14. Cha. 2. c. 11. ſ. 7.---EDITOR.

‡ 1. Eliz. c. 11. ſ. 2.---EDITOR.

And

And by the ſtatute of 14. Car. 2. * for the regulation of the cuſtomes, power is given to the king, by commiſſion to aſſign other places or ports (Hull excepted) for lading and diſcharging of ſhips, and alſo to ſett down and appoint the extent, bounds and limits of ports, and it is enacted, that no perſon ſhall lade or unlade merchandizes imported or to be tranſported, but only in ſuch open keys, &c. as ſhall be ſo aſſigned, without ſpecial ſufferance firſt had from the commiſſioners and officers of his Majeſty's cuſtomes, upon pain of forfeiture of the goods.

If a ſhip bound for Yarmouth or Newcaſtle paſs along the Downs by Dover, and it is to unlade goods by the way, in ſtrictneſs of laws he ought to come into the port and there make her unlading and entry. But, becauſe oftentimes the ſhips unlade *in tranſitu*, and cannot conveniently come into the port, if the merchants give notice thereof to the officers of the cuſtom-houſe timely, ſo that they may have opportunity to examine the goods before they are landed, this hath been conſtantly allowed in favour of the merchant. But if he doth it by ſurprize and deceit to deceive the king of his cuſtomes, it is a forfeiture of the goods; and the circumſtances of the manner and ſecrecy and unſeaſonableneſs of bringing in the goods are an evidence to prove ſuch deceit.

And thus much for the times and places of lading or unlading goods imported or to be tranſported.

CAP. XXIV.

Touching repayment of cuſtomes or duties once paid, upon emergencies.

BY the common law, if a merchant had once paid his cuſtomes outwards, though the goods were loſt before they came to their port of diſcharge, there was no remedy to have them repaid, but by a petition of grace to the king, upon which nevertheleſs the ſame was frequently granted, viz. that he might ſhip out as much goods as the loſs amounted to cuſtom-free.

But becauſe of the charge and trouble of obtaining mandates or grants under the great or privy ſeal for that purpoſe, of latter times proviſion hath been made by the act of tunnage and poundage, that the merchants ſhall have that allowance upon proof thereof made †.

* 13. and 14. Cha. 2. c. 11. ſ. 14.—EDITOR.

† Sect. 4. of the 12. Cha. 2. c. 11. contains a proviſion of this ſort—EDITOR.

And

And alſo by the book of rates there are ſeveral rules for the encouragement of trade, for allowance, ſometimes of the half cuſtome, ſometimes of the third part, and other allowances in caſes of exportation of forreign goods within certain times, which are needleſs to be repeated, becauſe they are all ſett down there at large.

And divers allowances are made by the ſame rules, viz. they fix what ſhall be allowed cuſtome-free for wrappers or package, what ſhall be allowed in wines for outs, that five *per centum* be allowed upon all goods, and what ſhall be allowed for leakage twelve pounds *per centum*.

Touching that allowance it was ruled 15. *Car.* 2. *in ſcaccario* that a merchant importing wines may, if he pleaſe, fill up his wines that are imported and in the port, and pay cuſtome for full tunns and hogſheads or pipes. But if he ſhall ſo fill up, he ſhall not have allowance for leakage. And the reaſon is, becauſe the allowance for leakage was at firſt by contract or capitulation between the king's officers and the merchant, viz. to have ſo much allowed in reſpect of the leakage and decay of his wines between the lading and importing of them; and in that very capitulation there was proviſion, that the merchant ſhould not fill up his veſſells, if he would have the allowance of 12*l.* per cent; and as it is continued by the ſame name, ſo it is continued upon the ſame account, viz. if the merchant will cuſtom his wines by the veſſell or caſk, he ſhall have the allowance; but if he will cuſtom by the content, he ſhall not have that allowance. And accordingly it was reſolved. Car. 2di.

CAP. XXV.

Concerning the cuſtomes of Newcaſtle coals, its original and progreſs.

IT appears by the parliament roll 9. H. 5. n. 35. *inter petitiones communitatis*, that the king was anſwered two-pence *per chaldre* for every chaldron of coals ſold in Newcaſtle to thoſe that were not free of the town of Newcaſtle; and thereupon commiſſions are directed to be iſſued to examine the quantity of the keels, in which ſuch coals are laden, which ſhould contain juſt twenty chaldrons; and accordingly the king's duty was anſwered, viz. 3*s.* 4*d.* for every keel, though they were oftentimes larger, whereby the king was deceived.

The

The mayor and burgeſſes of Newcaſtle obtained a charter in H. 6. and by the general words they claimed this two-pence per chaldron as a toll, though the words of the charter ſeem not to carry it.

Yet under the pretence of this charter they enjoyed the ſame as a toll from the buyer, and employed it by their oaſtmen towards the repair of their bridge and port, as appears by an inquiſition taken in the H. 6. and their conſtant uſage ever ſince; and becauſe it was at leaſt doubtful whether the words of their charter carryed it, they claimed it by preſcription. See the ſuit, as I take it, in the exchequer-chamber by Duncomb and others plaintiffs againſt the mayor and burgeſſes of Newcaſtle touching that duty of two-pence per chaldron.

About 40. Eliz. they were queſtioned at the council-table by one Hill for the ſame, and for the arrearages of the ſame as due to the crown. But upon proof of long payment for fifty years to the mayor and burgeſſes, the petition of Hill diſmiſſed.

Yet the mayor and commonalty, being awakend by this, for their better ſecurity in 42. Eliz. renewed their charter, got theſe duties confirmed to them, and the arrearage diſcharged; and in compenſation thereof granted to the crown twelve-pence per chaldron for every chaldron of coals exported and ſold.

In the parliament 1. Car. a bill was twice read and committed for the reveſting of the ſaid two-pence per chaldron to the crown; but it came to nothing.

Although upon a ſtrict examination ſuch a grant could not charge any other intereſt but their own, and men were much diſſatisfied therewith *; yet the payment of twelve-pence per chaldron to the crown continued, though with ſome diſſatisfaction.

But in the bill of ſubſidy and tunnage † and poundage, among the rules given touching the ſame in the end of the book of rates, wherein there is a ſpecial proviſion for the diſcharge of all other duties to the king upon goods imported and exported other than the duties ſettled by that act, there is an exception of priſage aud of this duty of twelve-pence per chaldron ‡.

* In 1655 a book was publiſhed on the ſubject and addreſſed to Oliver Cromwell. It was intitled, "England's Grievance in reſpect to the Coal Trade," &c. "by Ralph "Gardiner, of Chriſten in the county of Northumberland, Gent." The book is ſcarce, but may be ſeen in the collection of printed books at the Britiſh Muſeum.—EDITOR.

† 12. Cha. 2. c. 4.—EDITOR.

‡ The words of the exception are very ſtrong, viz. "Nevertheleſs it is declared, "that priſage of wines, the duty called butlerage, and the duty of twelve-pence of "every chaldern of ſea-coals exported from Newcaſtle upon Tyne to any other port "or ports of this realm ſhall be continued."—EDITOR.

By

By this exception that duty becomes now ſettled and unqueſtionable*; the farm whereof is well worth to the crown ſix thouſand pounds per annum.

And by the late act of parliament for the rebuilding of the city of London there is a further ſum of twelve-pence per chaldron impoſed upon all coals imported into the port of London above the duties formerly due.—And thus ſtands the ſtate of the cuſtomes for coals at this day, viz. 29. *Martii* 1667.

CAP. XXVI.

A general diſcourſe touching the cuſtomes of clothes as well exported as ſold within the kingdom; and therein concerning alnage.

THE cuſtomes of clothes were anciently and are at this day of two kinds, viz. the cuſtom of clothes exported by way of merchandize, and the cuſtom of clothes ſold within the kingdom, or the ſubſidy of alnage. I will examine them both together in this and the enſuing chapter, that ſo the whole buſineſs concerning the duties upon cloth may be laid open to one entire view.

I. Touching the cuſtome of clothes exported, this hath been in a great meaſure finiſhed in the ninth chapter, wherein the ſeveral inſtruments touching the ſame are recited, to which I ſhall often referr, and this ſhall be but a kind of extract of that buſineſs.

The cuſtomes or impoſitions upon clothes exported were of two kinds or originals, viz.

(1.) That which began by force of the *Carta Mercatoria*, which was for clothes exported by aliens.

* Before the 12. Cha. 2. two circumſtances had occurred, tending to confirm the duty upon coals at Newcaſtle.—1. In the petition of grievances addreſſed by the houſe of commons to James the firſt in 1610, one chief aim of which was to condemn impoſition at the ports by prerogative, this duty is diſtinguiſhed from thoſe they complain of, becauſe it began by *contract* and *grant*, and not under a mere pretext of the royal prerogative, as they repreſent the one ſhilling duty then payable on coals at Blythe and Sunderland to have commenced. See State Trials, vol. xi. page 65.—2. The ſtatute of 21. James 1. c. 3. againſt monopolies contained a proviſo in favour, as well of the privileges of ſelling and carrying coals at Newcaſtle exerciſed by the fraternity of hoaſt-men there, as of the duty of one ſhilling per chaldron for coals, which they granted to the crown in conſideration of that privilege. See 21. James 1. c. 3. ſ. 12.—EDITOR.

(2.) The

(2.) The ſecond was that which began by impoſition about 20 E. 3. as well on denizens as aliens.

(1.) Touching the former of theſe, viz. thoſe ſett by *Carta Mercatoria*, the copy whereof is inſerted *ſupra*, cap. 7.* they were theſe:

2*s.* of every cloth of ſcarlet or dyed with grain,
1*s.* 6*d.* of every cloth in which there was part grain,
1*s.* of every other cloth without grain.

And theſe cuſtoms charged all aliens, whether they were the merchants of the Hanſe or others, and ſeem to extend as well to clothes imported as to thoſe exported.

But this extended only to whole clothes; for if only parcells were to be exported, or that cloth was cut into garments and ſo exported, aliens paid only their poundage as for averdupoiſe, viz. 3*d.* for the value of every 20*s.*

But to remedy this by the ſtatute of 11. H. 4. above mentioned, cap. 8. aliens were to pay their cuſtomes by *Carta Mercatoria*, and alſo the impoſt or cuſtom ſett 21. E. 3. hereafter mentioned, proportionably and rateably for ſuch pieces of clothes and garments in proportion to whole clothes.

And ſometimes they paid for the ſame pieces alſo their poundage over and beſides; but this was ſometimes remedied.

The Hanſe merchants did ſometimes pay for theſe pieces as other merchants-ſtrangers; but in the time of king E. 4. when their privileges were revived and favored, they paid only their poundage for garments and pieces of clothes, inaſmuch as they were to enjoy the privilege of *Carta Mercatoria*, and were not to be charged with new cuſtomes or impoſitions; and ſuch was this reckoned, viz. to pay rateably for pieces of clothes and garments.

(2.) The ſecond duty upon clothes was that which began by impoſition in the time of E. 3. and had the countenance of a confirmation by parliament 21. E. 3. as appears by the petition and anſwer concerning the ſame, mentioned *ſupra*, cap. 9.† and carried with this equity, that whereas the king had a cuſtom of inheritance ſettled in him of woolls exported, viz. of every ſack of wooll exported 6*s.* 8*d.* and of aliens by *Carta Mercatoria* of 40*d. in toto* 10*s.* and about 20. E. 3. much of the wooll of the realm was draped into cloth and exported in that manufacture, it was thought juſt, that the king ſhould have a proportionable benefit of wooll exported in manufacture, as if exported in ſpecie. And upon the reaſonableneſs of that conſtruction that duty was ſettled and impoſed, and hitherto continued with ſome alterations; viz. there was impoſed 20. E. 3.

* Ante, p. 157.—EDITOR.

† Ib. p. 166, 167.—EDITOR.

1. Upon

1. Upon every woollen cloth without grain exported,
   By denizens - 14*d.*
   By aliens - 21*d.*
2. Upon every cloth of worſted exported,
   By denizens - 1*d.*
   By aliens - 1*d. ob.*
3. Upon every bedd of worſted exported,
   By denizens - 10*d.*
   By aliens - 15*d.*

This bears ſome proportion to the cuſtome of woolls. But this was not all; for in a little while they took conſideration of the various values of cloth, not only in reſpect of the materiall, but in reſpect alſo of the ſpecies of the cloth. And in that reſpect the impoſition upon clothes without graine indeed were at 14*d.* for denizens, and 21*d.* for aliens, viz. a third part more according to their different proportion of cuſtomes of wooll. But ſhortly after there was this addition,

1. Upon a cloth of whole grain or ſcarlet exported,
   By denizens - 2*s.* 4*d.*
   By aliens - 3*s.* 1*d.* and after that 3*s.* 6*d.*
2. Upon a cloth of half grain exported,
   By denizens - 21*d.*
   By aliens - 2*s.* 7*d.*

It reſted thus for the moſt part of E. 3. and R. 2.'s time and downward to the time of E. 4. only as is before ſhewn, cap. 9. it was extended to new manufactures in the ſame proportion, as to kerſeys *Rot. Parl.* 15. *R.* 2. *n.* 43. to clothes made into garments ſtat. 11. H. 4 cap. 7. to Corniſh and Devonſhire clothes called ſtreits *Rot. Parl.* 2. H. 5. *par.* 1. *n.* 39.

In the 2d year of E. 4. the rates of the cuſtoms for cloth run thus, viz.

Of every cloth of aſſize or whole cloth exported,
   By denizens - - 14*d.*
   By aliens - - 21*d.*
Of every cloth of ſcarlet or whole grain exported,
   By denizens - 2*s.* 4*d.*
   By aliens - 3*s.* 1*d.* and afterwards 3*s.* 6*d.*
Of every cloth of half grain exported,
   By denizens - 21*d.*
   By aliens - 2*s.* 7*d.*

And over and beſides theſe rates, the aliens paid their cuſtoms for cloth ſet by *Carta Mercatoria*, viz. 12*d.* for a cloth without grain, 2*s.* for a cloth of whole graine or ſcarlet, and 18*d.* for a cloth

cloth of half graine; but they paid no poundage, viz. 3*d.* *per lib.* for theſe clothes.

But the Hanſe merchants, ſome time in the time of E. 3. were contented to pay the impoſition cuſtom upon clothes, according as other merchants did, and were acquitted of the cuſtom ſett by *Carta Mercatoria*. But afterwards, eſpecially in the time of E. 4. they took advantage of their revived privileges, and were thereupon diſcharged of all thoſe impoſition-cuſtoms upon clothes, and only anſwered the cuſtome ſett by *Carta Mercatoria*, viz. two ſhillings for a cloth of whole graine, 18*d.* for a cloth of half graine, and 21*d.* for a cloth without graine.

But beſides this impoſition upon clothes thus inhaunced in the time of E. 4. the impoſitions upon worſted were alſo inhaunced, viz. 1. On pieces of worſted. 2. On bedds of worſted.

1. For pieces of worſted.
   For a ſingle piece of worſted exported,
      By denizens - 2*d.*
      By aliens - 3*d.*
   For a double piece of worſted exported,
      By denizens - 2*d.*
      By aliens - 3*d.*

2. For bedds of worſted exported,
   Single bedds exported,
      By denizens - 5*d.*
      By aliens - 7*d. ob.*
   Half doubles exported,
      By denizens - 7*d.*
      By aliens - 10*d.*
   Doubles exported,
      By denizens - 10*d.*
      By aliens - 13*d. ob.*

But beſides all theſe impoſed cuſtomes, the aliens paid their 3*d.* per pound upon all ſorts of worſteds by virtue of *Carta Mercatoria*. Only the Hanſe merchants of the Stillyard in the time of E. 4. paid only 3*d.* per pound upon all ſorts of worſteds by *Carta Mercatoria*, and were diſcharged of the impoſed cuſtoms upon worſteds by virtue of their privilege which was then revived: only they were charged by ſome compoſition, as it ſeems, with 2*d.* for every piece and bedd of worſted, beſides their poundage by *Carta Mercatoria*.

And

And thus ſtood the cuſtomes upon cloth by impoſition till the time of queen Mary; during all which time it is obſervable, that the proportioning of the cuſtom of cloth, both upon aliens and denizens, was not with regard to the value of the ſubſidies upon wooll, which were ſometimes very great, but only with regard to the old cuſtom of woolls of half a mark upon denizens, and ten ſhillings upon ſtrangers for a ſack of wooll.

Queen Mary had the ſubſidy upon woolls granted for her life, viz. 33*s.* 4*d.* of Engliſh, 3*l.* 6*s.* 8*d.* of foreigners, beſides the old cuſtomes of wooll, which amounted to 40*s.* upon Engliſh, 3*l.* 16*s.* 8*d.* upon foreigners. And by a decree of the council 4. and 5. P. and M. before mentioned*, there was an inhauncing of the old impoſition on cloth in ſome proportion to the ſubſidies and cuſtomes; viz. They computed four ſhort cloths to anſwer a ſack of wooll, and thereupon ſett an impoſition in ſome proportion, though not fully anſwering the cuſtom and ſubſidy of a ſack of wooll, viz. upon Engliſh 6*s.* 8*d.* for every ſhort cloth which amounted to 26*s.* 8*d.* for four cloths, and upon aliens 14*s.* 6*d.* which for four clothes came to 58*s.* which was ſhort of the ſubſidy for a ſack of wooll.

And proportionably the cuſtomes of kerſeys, ſtreits, &c. were reduced in proportion to the broad ſhort clothes.

Thus the impoſition or cuſtom upon clothes continued till 2. Jac. at which time the king having the like ſubſidy of woolls granted him, viz. 33*s.* 4*d.* by Engliſh, which together with the old cuſtome of 6*s.* 8*d.* amounted to 40*s.* and 3*l.* 6*s.* 8*d.* of foreigners, which with the old cuſtome amounted to about four pounds, it was found, that the cuſtomes formerly taken upon clothes did not amount to the proportionable ſubſidy of wooll; and therefore the cuſtom or impoſition upon every ſhort cloth of denizens was reduced to 10*s.* and the like rateable proportion increaſe made upon clothes exported by ſtrangers anſwering their ſubſidy and cuſtome of woolls, which were called pretermitted cuſtomes.

This, with various complaints and ſome intermiſſions, was taken in the time of king James.

At this day by the act for tunnage and poundage, the cuſtom or ſubſidy of cloth exported is reduced to 3*s.* 4*d.* upon Engliſh, and 6*s.* 8*d.* upon foreigners; and ſo it ſtands at this time †.

And thus far of the cuſtomes and impoſitions of cloth exported‡.

* Ante, cap. 14.—EDITOR.

† The 11. and 12. W. 3. c. 20. took away all duties payable by any previous ſtatute or law whatever on the operation of Engliſh woollen manufactures. See Sect. 1.—EDITOR.

‡ Such as are curious to go further into the ſubject of the duties upon clothes exported, may be fully gratified by conſulting thoſe two moſt celebrated hiſtories of trade, Mr. Smith's Memoirs of Wool, and Mr. Anderſon's Chronological Deduction of Commerce.—EDITOR.

CAP.

CAP. XXVII.

Concerning the ſubſidy of alnage.

CONCERNING the inland cuſtome of clothes, which is alnage, ſhall be my next enquiry.

It is certain, that antiently, eſpecially in the times of H. 2. R. 1. and the beginning of king John, there was a great quantity of woollen cloth made in England. This appears, 1. By thoſe many guilds and fraternities of weavers erected in moſt of the conſiderable towns and cities in England with large privileges, and that anſwered good fee-farm rents to the crown. 2. By the antient aſſiſes ſett for the length and breadth of woollen clothes, whereof hereafter.

But it is likewiſe true, that in the long civil wars, eſpecially in the time of H. 3. the manufacture was almoſt loſt, but revived again gradually, till the beginning of E. 3. when it arrived to a reaſonable condition, for ſo the records before mentioned touching the impoſition upon clothes exported tell us, that *magna pars lanæ pannificatur*; and by the ſtatute of 11. E. 3. cap. 3. the importation of foreign clothes was wholly prohibited.

This will be found a neceſſary precognition to the hiſtory of the ſubſidy of alnage intended in this chapter.

I ſhall therefore conſider and examine theſe three matters, in order to the full diſcovery of this buſineſs:

I. How the caſe ſtood antiently and in ſucceeding time in reference to the length and breadth of cloth; for *ulnagium*, or aulnage, or alnager, is a term of relation to the common meaſure of cloth by the ell or *ulna*.

II. I ſhall conſider how the office of the aulnager ſtood in antient and ſucceeding times.

III. I ſhall in the laſt part conſider the ſubſidy of alnage itſelf, its beginning and progreſs, and to what it extended.

I. Touching the meaſure of cloth,

It appears by Roger Hoveden, fol. 774, that in the time of R. 1. there was a certain aſſize of the breadth of clothes, viz. *Panni Lanei ubicunque fiant, fiant de eâdem latitudine, viz. de duabus ulnis intra liſuras, et ejuſdem bonitatis in medio et lateribus, ſub pœnâ forisfacturæ.* In the time of king John upon the petition of the merchants that aſſize was repealed. Hoved. 822.

By the great charter 9. H. 3. cap. 25. the former aſſize for breadth of woollen clothes, *tinctorum buſſatorum et haubergettorum, ſcilicet*

ſcilicet duæ ulnæ inter liſuras. And accordingly the aſſize of cloth was proclaimed, *Clauſ. 22. H. 3. m. 12. dorſo cuſtodibus Nundinar' Sancti Botolfi.*

But the enſuing troubles in the reign of that king cauſed much interruption in trade; and beſides this aſſize extended only to the breadth, not the length of clothes.

King E. 1. in the ſixth year of his reign makes a new and fuller proviſion for the aſſize of cloth, and reinforceth a proclamation made by his father in the 56th year of his reign, viz.

1. *Quòd quilibet pannus Angliæ, cujus ulna valet quatuor ſolidos et ultra, ſit latitudinis 2 ulnarum inter liſuras.*

2. *Alii panni vilioris et minoris pretii ſint 7 quarteriorum ſecundum aſſiſam antiquam.*

3. *Quilibet pannus de partibus tranſmarinis, qui ſit de duabus ſedibus, ſit longitudinis 26 ulnarum et latitudinis ſex quarteriorum inter liſtas.*

Et quòd omnes panni predicti, tam ciſmarini quàm tranſmarini, qui non ſunt longitudinis et latitudinis predict' be ſeized into the king's hand, *exceptis aſſaiis partium tranſmarinarum Scotiæ et Hiberniæ, de quibus certa menſura non habetur.*

This is entered upon the parliament roll of 25. E. 3. n. 49. But yet it ſeems this did not limit any length to Engliſh —clothes.

By the ſtatute of Northampton 2. E. 3. cap. 14. all clothes put to land ſhall be of the meaſure following, to be meaſured by the king's aulnager, under pain of forfeiture, viz. every cloth of ray 28 yards long, 6 quarters broad; every coloured cloth 26 yards long, and 26 quarters and a half broad.

But this extended only to foreign clothes imported.

By the ſtatute of 25. E. 3. cap. 1. the ſame aſſiſes are ſettled upon all clothes found with any merchant under pain of forfeiture; and the king's aulnager to meaſure them.

Rot. Parl. 25. E. 3. n. 44. a repeal of that ſtatute is deſired. All that it obtained was an act, that the aulnager ſhould only meaſure whole clothes.

Then enſued the ſtatute of 27. E. 3. cap. 4. touching the alnage, whereof properly hereafter.

By the ſtatute of 47. E. 3. cap. 1. clothes of ray to be made in England, to be 28 yards long, and 6 quarters broad; coloured clothes to be 26 yards long, and 6 quarters at leaſt broad; under pain of forfeiture.

By the ſtatute of 17. R. 2. cap. 2. every man may make his cloth of what length and breadth he pleaſe, paying his aulnage *pro ratâ*; but none to put his cloth to ſale before meaſured by the

the king's aulnager. This is after in part repealed by the ſtatute of 5. E. 6. as to the length and breadth of clothe.

By the ſtatute of 7. H. 4. cap. 10. coloured clothes and clothes of ray are to be of the ſame length and breadth as is appointed by the ſtat. of 2. E. 3.

By the ſtatute of 11. H. 4. cap. 6. a new ſeal ordained for the aulnager on whole clothes and dozens.

By the ſtatute of 11. H. 6. cap. 9. it is declared, that the word cloth in the ſtatutes of 7. and 11. H. 4. are only intended of broad cloth and broad dozens; and not of clothes called ſtreits, which may be 14 yards long and one yard broad, paying the ſubſidy *pro ratâ*, and not to be put to ſale till meaſured by the aulneger.

By the ſtatute of 4. E. 4. cap. 1. a meaſure and ſeals appointed for half clothes, ſtreits and kerſeys.

The ſtatute of 17. E. 4. cap. 1. alters that way of ſealing in reſpect of the king's loſs of his aulnage.

After this there follow ſeveral acts of parliament limitting the weight and meaſure of ſeveral clothes of ſeveral countries and natures, viz. 34. H. 8. cap. 11. 5. and 6. E. 6. cap 6. 2. and 3. P. M. cap. 12. 4. and 5. P. M. cap. 5. 8. Eliz. cap. 7. 27. Eliz. cap. 17. and laſtly, 4. Jac. cap. 2. whereby, among other things, the eſtimate of the length of a broad cloth is to be 24 yards, and according to that eſtimate of length the duties to be anſwered.

And thus ſtands the meaſure of clothes according to the various proportions ſettled by theſe acts; which is neceſſary to be known in reference to what follows, becauſe it explains the ſame and the reaſons of it.

II. The ſecond thing which is to be examined is the aulnager's office, and incidents thereunto*.

(1.) By what appears, it is plain there was an officer of aulnager long before the ſtatute of 27. E. 3. when the ſubſidy of alnage was firſt granted. And this appears by the very acts abovementioned, which anteceded the ſtatute of 27 E. 3. *Vide Rot. Parl.* 13. *E.* 1. *m.* 2. the office of alnager over all England granted. And indeed it had been idle to have ſettled aſſizes of cloth, as is before mentioned, unleſs ſome common officer had been appointed to have looked after it, and after the king's forfeitures for not obſerving it.

The office therefore of alnage was inſtituted firſt and principally in referrence to commerce and trade, to ſee that the buyer was not deceived by the ſeller; and as the clerk of the market was firſt appointed to prevent deceits in weights and meaſures, ſo was the alnager in referrence to cloth and in referrence to the king, to gather up his forfeitures in caſes of defaults.

* See 4. Inſt. 30. 31. and 280.—EDITOR.

(2.) To

(2.) To what it extends.—And 1. it is extended only to cloth of wooll, and therefore not to canvas and linnen. And therefore when the king H. 4. granted an office of meaſuring of canvas with a certain fee upon every cloth, it was adjudged both in the king's bench and parliament, that the grant was void. *Rot. Parl.* 11. *H.* 4. *n.* 49. *Rot. Parl.* 13. *H.* 4. *n.* 43. *T.* 11. *H.* 4. *B. R. Rot.* 27. Cook on *Magna Carta, cap.* 30. page 62.—And 2. it did not, neither doth extend to all manufactures of wooll. And therefore it was alſo, that when the king E. 1. granted the office of aſſay and meaſurage of worſteds, it was repealed as prejudicial to the people, and that repeal affirmed and renewed *Rot. Parl.* 22. *E.* 3. *n.* 31.

And the manufactures of wooll, that anciently came not under any determinate meaſure, were not antiently within the alnager's office, till reduced under the ſame. And ſome were appointed to be meaſured as well as to pay the alnager's fee, as ſtreits and kerſeys by the ſtatute of 1. R. 3. cap. 8. and ſo of other ſhort clothes by the ſtatute of 17. R. 2. cap. 2. Of ſome he is appointed to take his fees, though he did not meaſure them, as rugges and Lancaſhire frizes by the ſtatute of 8. Eliz. cap. 12. And generally at this day the alnager doth not meaſure broad clothes; for he is inhibited from it by the ſtat. * and yet by the ſtatute 4. Jac. cap. 2. he is to take his fees, wherein a cloth of 24 yards long and 64lb. weight is made the ſtandard and eſtimate of a broad cloth.

(3.) Touching his fees. They are ſettled by the ſtatute of 27. E. 3. viz. for a whole cloth an half-penny, for half a cloth a farthing, to be taken of the ſeller; but for leſs than half a cloth he was to take nothing. But in enſuing ſtatutes, eſpecially that of 17. R. 2. cap. 2. where every one might make clothes of what length or breadth they pleaſed, it ſeems the alnager's fee was ſaved, and his office to be exerciſed, though there were no ſettled meaſure for cloth from that time till a long time after. And although at this day the alnager doth not, nor in ſome caſes may not, meaſure ſome ſorts of clothes; yet in all caſes his rateable fee is ſaved; and regularly at this day in all caſes, where the king may lawfully take his ſubſidy, the alnager may take his fee limited by the ſtatute of E. 3. Therefore the diſcuſſion of the king's duty will illuſtrate this.

III. Therefore I come to conſider the ſubſidy or duty of alnage. This duty was firſt ſettled by the ſtatute of proviſions of 27. E. 1. cap. 4. by which act—1. The forfeitures accrued to the king for the want of due meaſure of clothes before that time are pardoned.—2. The office and fee of

* See 1. R. 3. c. 8. ſ. 6.—EDITOR.

the

the alnager are ſettled and aſcertained.—3. A perpetual duty to the king called the ſubſidy of alnage was eſtabliſhed and ſettled; viz.

	£.	s.	d.
Of every cloth of aſſize wherein is no graine	0	0	4
Of every half cloth wherein no graine	0	0	2
Of every cloth of aſſize of ſcarlet on whole graine	0	0	6
Of every half ſuch cloth	0	0	3
Of every cloth of aſſize half graine	0	0	5
Of every half ſuch cloth	0	0	2 ob.

—Every half cloth paſſing the aſſiſe by 3 yards to pay as a whole cloth.—Where ſubſidy is once paid, or for cloth made for a man's own uſe, nothing more to be paid.—Clothes ſold before they are ſealed by the alnager to be ſeized as forfeit wherever they are found.

Upon this act theſe things are conſiderable:

1. When this ſubſidy is due.—And regularly it is not due, but when the goods are ſold; for it is to be paid by the ſeller.

But by the ſtatute of 8. Eliz. cap. 12. the ſeal and alnager's fee is to be paid when carried out of the county.

2. Of what quantities.—It ſeems this act extends only to whole clothes and half clothes by the letter of it. But poſſibly by a conſtruction it may be extended to a rateable ſubſidy for ſmaller parcells. Yet *quære*; for there is proviſion made, that if it exceed the half cloth by 3 yards it ſhall pay for a whole cloth; which imports, that the makers of the law intended no rateable ſubſidy for parcells; for if it had, it would not have made proviſion in ſuch manner for parcells.

But the ſtatute of 17. R. 2. cap. 2. hereafter mentioned makes ſufficient proviſion in this caſe for ſmaller parcells, and alſo the following acts.

3. Of what kinds of cloth.—The letter of this act extends only to whole and half cloths of aſſiſe. But this is remedied after by the ſtatute of 17. R. 2. cap. 2. as ſhall be ſhewn.

By the ſtatute of 51. E. 1. cap. 7. clothes not fulled are not to be exported, nor pay alnage.

By the ſtatute of 51. E. 3. cap. 8. no ſubſidy of alnage is to be paid of Iriſh cloth, nor cloth made of Iriſh wooll. But the reaſon ſeems principally to be in favour of the Iriſh manufacture, and becauſe it paid before its ſubſidy or cuſtom upon its exportation from thence.

4. The remedy for the duty is by the forfeiture of the goods unſealed; for now the alnager's ſeal was not only a teſtimoniall that the cloth was of due aſſiſe, but alſo that the ſubſidy of alnage was duly anſwered; and this forfeiture extends alſo by

conſtruction to thoſe other ſorts of clothes, which by ſubſequent acts were brought within this duty.

The ſecond and principall ſtatute concerning the ſubſidy of alnage is that of 17. R. 2. cap. 2. whereby it is enacted, that every man may make and ſell cloth, as well kerſeys as others, of what length and breadth he pleaſe, paying the alnage and other ſubſidies and duties *pro ratâ*; but none to put to ſale any cloths before they be meaſured and ſealed by the king's alnager.

Upon which act theſe things are plain and obſervable:

1. That although the aſſiſe of the cloth was now in effect wholly taken away, yet the king's duty of alnage continued.

2. That conſequently whatever the quantity of the cloth was that was expoſed to ſale, yet the ſeller was to pay a ſubſidy of alnage *pro ratâ* for it.

3. That the forfeiture enacted by 27. E. 3. doth extend to the alnage due by virtue of this act.

But then the greater queſtion, that hath been moved, hath been—(1.) Whether at leaſt by virtue of this ſtatute the new-invented draperies, as ſerges, bayes perpetuanas and bayes, are liable to pay this ſubſidy or not.—(2.) If yea, then in what proportion.—And

(1.) It hath been ruled, that they ought to pay this duty, which is made evident,

1. By the ſtatute of 17. R. 2. itſelf, which takes kerſeys as as well as other cloth to be chargeable with this duty; and yet kerſeys were a new manufacture and not in uſe at the making of the ſtatute of 27. E. 3. nor mentioned in it, but only clothes of aſſiſe.

2. By the ſtatute of 1. H. 4. cap. 19. proviſion is ſpecially made, the kerſeys, Kendal cloth, Coventry frizes, nor none other cloth nor remnant of cloth of England or Wales, whereof the dozen exceed not 13s. 4d. pay no ſubſidy for three years; which were new manufactures and needed not this proviſion, if not liable to alnage. And when *Rot. Parl.* 9. *H.* 4. *n.* 34. a perpetual exemption of them from alnage was deſired, it was denied. Only by the ſtatute of 9. H. 4. cap. 35. Kendall clothes, whereof the dozen exceeded not 6s. 8d. are exempted perpetually from alnage. *Vide ſtat.* 7. *Jac. cap.* 10.

3. By the ſtatute of 11. H. 6. cap. 9. though clothes called ſtreits are declared not to be cloth within the ſtatutes of 7. and 11. H. 4. touching length and breadth of clothes, but any man may ſell them at 14 yards long and one yard broad; yet they are to pay the king his alnage *pro ratâ*.

ratâ. The like appears for ſtreits and kerſeys, by comparing the ſtatute of 4. E. 4. cap. 1. and 17. E. 4. cap. 5.

4. By the ſtatute of 8. Eliz. cap. 12. Lancaſhire cottons, frizes and rugges, though a new kind of manufacture, are chargeable with alnage and the alnager's fee.

5. Accordingly certified by the opinion of all the judges P. 2. *Jac.* and ſo recited by Cook on *Magna Carta*, page 62.

6. And accordingly reſolved by the barons of the exchequer after ſeveral arguments . Car. 2. *Rex verſus Samſon* upon an information for Colcheſter bayes ſold, and the alnage not paid, and judgment *pro rege* that the bays were forfeit *.

But there was no opinion given by the court touching Norwich ſtuffs made of worſted, wherein the judges in 2. Jac. ſeemed rather to be of opinion, that the alnage was not due for them; firſt, becauſe of the inconveniency in opening theſe ſtuffs; and ſecondly, becauſe never taken of theſe ſtuffs.

I ſhall only add ſome obſervables more in confirmation of that opinion touching the exemption of Norwich ſtuffs from alnage.

1. They were never under the office of the alnager, nor ſubject to be meaſured by the king's officer; and when it hath been attempted, the patents have been repealed. *Vide Rot. Parl.* 22. *E.* 3. *n.* 31. *Rot. Parl.* 11. *H.* 4. *n.* 38. And ſince the alnager's ſeal was the only, or at leaſt chief evidence of the payment of the ſubſidy, it is not likely, that any ſuch ſtuffs ſhould be chargeable with the duty that were not liable to the alnager's office.

2. By ſpecial acts of parliament, namely E. 4. † the regulation, ſearch, and examination of Norwich ſtuffs, their goodneſs and meaſure, is put under another government. And hence it is, that, although moſt of the new manufactures of wooll, are mentioned and regulated for their length and breadth, in ſome of theſe ſeveral acts of parliament beforementioned; yet I remember no mention in any of them, of Norwich ſtuffs or worſteds.

3. Somewhat may be conſiderable likewiſe in the manufacture itſelf, which differs from others, for there is not only a difference in the ſpinning and weaving, but even in the wooll itſelf, which is in a manner a manufacture in it's very preparation before it be otherwiſe uſed.

* The caſe here cited was adjudged in Mich. 13. Cha. 2. and is reported in Hardr. 205.—Editor.

† See 20. H. 6. c. 10. 23. H. 6. c. 3. 7. E. 4. c. 2.—Editor.

It is true there have been conteſts about it in the court of exchequer, as alſo about dornix, linſey-wolſey, and knitt ſtockings, and informations directed and preparatives to it, by depoſiting of the duty; but never that I find reſolved, nor peaceably enjoyed. *Vide inter decreta ſcaccarii* 3. Jac. 4. Jac. 6. Car. at the proſecution of the duke of Lenox.

But for other new draperies there ſeem to be ſettled reſolutions, or at leaſt opinions, of that court, that they ought to pay alnage. In *M.* 3. 4. *Eliz. Rot.* 191. *Mich.* 32. 33. *Eliz. Rot.* 321. *M.* 39. *Eliz. lib. Decretor'* 262. Hall and Greathead, there are decrees directing and ordering the payment of alnage for new draperies; but none of theſe ſpeak of Norwich ſtuffs.

(2.) Touching the proportion that they are to pay, it may have a double reſpect.

1. To the quantity.—And the rule or meaſure ſeems to be this. By the ſtat. of 4. Jac. before-mentioned, a whole cloth is eſtimated at 24 yards and 64lb. and according to that eſtimate it pays it's alnage for a whole cloth, and in that proportion for part of a cloth. The proportion of alnage for a cloth of aſſiſe without grain by the ſtatute of 27. E. 3. ſt. 1. c. 4. is 4d. If therefore a pack of bayes weighs 64lb. it ſhall pay it's alnage for a cloth of aſſiſe, viz. 4d. and ſo *pro ratâ*.

2. To the quality.—As by the ſtatute of 27. E. 3. there be ſeveral rates of alnage for cloth without grain, half grain, and whole grain, ſo the rates will be accordingly diverſified in ſtuffs, allowing as before 64lb. to be the weight of a whole cloth. And it hath been taken as to cochineal, that though a materiall for dying lately found, yet a cloth dyed with it ſhall be ſaid in grain.

There remains this only enquiry, which I ſhall add to conclude this buſineſs.—Why was not the invention of Micholſon, for the pretermitted cuſtomes to be taken in cloth, proportionable to the ſubſidy and cuſtome of woolls, as juſtifiable, as this the taking of alnage upon new manufactures in proportion to the old; and how came it to paſs, that the ſame judges, that condemned that as an unlawful impoſition, juſtify this as lawful? C. M. Cart. 60. 61.

I anſwer, the difference is this. In the former caſe, the ſubſidy and cuſtom lay upon the bare material, viz. the wooll; and therefore the tranſlating it upon wooll when manufactured into cloth,

was

was to transfer it upon another kind. But alnage in its first institution was sett upon cloth, and the new invention of draperys is but a new species of the same germs; and both the new and the old agree in the common denomination of cloth; and if it should be otherwise, any little diversification of a manufacture should render it another thing, and so deprive the king of what was intended him*.

CAP. XXVIII.

Concerning things taken upon the sea, and letters of marque and reprizall.

I SHALL conclude the whole discourse with something, that hath a cognation with maritime business; which, though it be not altogether proper to the business of customs, yet it may be worth the knowing, at least in relation to the business of trade, viz.

I. Touching prizes or taking of goods upon the sea in times of hostility.

II. Touching marque and reprizall upon injuries done in times of truce or peace.

I. Touching the former of these, viz. things or persons taken in times of hostility, wherein these things will be inquirable.

(1.) What shall be said hostility†.

That is a time of hostility, when war is proclaimed by the king against a foreign prince or state. This and this only renders them enemies.

If there be warr between two princes upon the seas, and mutual fighting, as between us and the Hollanders at this day; although as between the sovereigns it is in many respects a time of hostility, and therefore each doth take and confiscate the goods taken; yet to many purposes it is not a time of hostility, especially in relation to the subjects of either side.

1. There is in such case no universal confiscation *ipso facto*, without an express mandate, of the goods found of either in the other's territory.

2. The receiving of subjects of the foreign prince or state is not *ipso facto* high treason, without some assistance given them in order to the warr.

3. The subjects of either side may not take the goods of others without commission, which is usually granted by the lord admiral.

* Since lord Hale's time the subsidy or duty of alnage has been wholly taken away. See 11. and 12. W. 3. c. 20. s. 2.—EDITOR.

† See on this subject 1. Hal. Hist. Pl. C. 160. to 164.—EDITOR.

admiral. If he doth aſſaile the foreigners ſhips otherwiſe than in his own defence without ſuch commiſſion, it is a depredation; for it is not a time of abſolute hoſtility, in reſpect eſpecially of the king's ſubjects, but qualified, viz. that commiſſions ſhall iſſue of repriſall to them that deſire it; and this qualification is commonly in the proclamation that iſſues upon ſuch occaſion, although in truth there is another end of ſuch commiſſion, viz. that the parties employed in ſuch acts of hoſtility as privateers may be known, and may ſecure the ſhares belonging to the king or admiral of goods taken, and may be reſponſible for any miſcarriage at ſea under pretence of hoſtility.

And upon this reaſon it is, that taking of goods by or from pirates comes not entirely under thoſe laws, that concern *capta per hoſtes vel ab hoſtibus*. That which pirates take changeth not the property of the true owner, as it doth in caſe of an enemy; for ſuch a taking is but a ſpoliation, and not a lawfull caption. 2. R. 3. 2 ſtat. 27. E. 3. ſt. 2. cap. 13.

(2.) The next enquiry is, what effects the taking of the goods of ſuch an enemy hath.

1. Regularly the goods of an enemy, that are found within the king's dominions, do not belong to him that finds them, unleſs they be taken by him *more hoſtili*; but they belong to the king as *bona inimicorum*, which is a prerogative belonging to the king, and was inquirable as one of the articles of the Eyre, viz. *de cattallis Francorum vel Flandrenſium vel aliorum inimicorum domini regis retentis, quia illa habeant.*

2. But if the goods of an enemy were taken by force, either in a ſea-fight or in battle upon the land, regularly by the ancient law the goods became his that took them, viz. as ſoon as they were brought *intra preſidia*, 2. R. 3. 2. And this was to encourage the valour and induſtry of the ſoldier. And on the other ſide, if an enemy take the goods of an Engliſhman, it changed the property, inſomuch that if it were retaken again by another Engliſhman from the enemy, the property of the firſt owner was loſt, and ſhould not *redire jure poſtliminii* to him by the retaking of it by another. 7. E. 4. 14. 22. E. 3. 16. *per* [illegible] it ſhould ſeem by that book, and by other records, that if the enemy had not had the goods in his cuſtody by one intire day and night, according to the cuſtom of England, the firſt man's property were not loſt; and therefore that if retaken by another within that time, the firſt owner was to be reſtored.—*Clauſe* 26. *E.* 3. *m.* 22. The Caſtellan of Calais ſeized goods as wreck, which had been taken by a pirate (I ſuppoſe it was intended an enemy)

from

rom an Engliſh merchant *non amotis ſervientibus dicti mercatoris*. The Engliſh merchant prays reſtitution, *et quia deducto negotio coram admirallo et conſilio viſum eſt eis, per legem maritimam bona per piratos capta ſuper mare, quæ in manibus piratorum per unam diem et unam noctem non permanſerunt, mercatoribus ſuper cuſtodia earundem reſtitui debere*: therefore reſtitution is granted.

3. But although this was the antient law, yet at this day, and indeed anciently, there are ſeveral conſtitutions, that do correct this tranſlation of the property of the goods of enemies to the taker, and to avoid diſorder and confuſion ſome qualifications are introduced variouſly according to various times in caſe of goods taken by pirates or men of war from enemies. For—1ſt at this day, even in caſes of hoſtility, private men of war muſt have a commiſſion from the king or admiral.—2d. There is a diſtribution made of the goods taken upon the ſea by men of war, and in ſome caſes alſo by merchantmen that take the goods of enemies in their own defence. *Vide in Nigro Libro Admiralitatis, et Clauſ.* 19. *E.* 2. *m.* 26. *pro Roberto Beudyn.* If a fleet or ſhip under the king's wages took a prize, the king had a fourth part; the owner of the ſhip another fourth; the reſidue was divided among the takers. If the admiral were abſent, he was to have due ſhare equal to a common ſoldier, if preſent he had two ſhares *per totum*. But theſe proportions have been occaſionally varied, and rarely been uniform in all times. *Vid. Rot. Parl.* 50. *E.* 3. *n.* 81. 5. *H.* 4. *n.* 59. 8. *H.* 4. *n.* 22. 20. *H.* 6. *n.* 30. At this day the admiral hath the third of goods taken by private men of war as his fee, but in right of the king. Proportions of this kind vary as occaſions require at the king's pleaſure.

4. What ſhall be ſaid prize.

If an enemy come into the ſea with the king's ſafe conduct, his goods taken ſhall not be prize to the taker; for the ſafe conduct is a kind of perſonall ſuſpenſion of the hoſtility, and accordingly they are privileged from mark and repriſal. *Vide* ſtat. 20. H. 6. cap. 1. and 14. E. 4. c. 4. whereby thoſe letters of ſafe conduct ought to be enrolled in chancery, that it may be known to whom granted.

If the goods of an enemy are carried in the ſhip of a friend and bound for an enemy's country, and the ſhip is taken by the Engliſh, the goods are prize, but not the ſhip wherein they are taken, nor the other goods in it. *Clauſ.* 47. *E.* 3. *m.* 39. *pro mercatoribus Hiſpaniæ et Portugalliæ*, *Clauſ.* 48. *E.* 3. *m.* 24. *de vinis conqueſtis deliberandis.* But otherwiſe

otherwiſe it may be of ammunition for war he ſhall carry. *Clauſ.* 20. *E.* 3. *Par.* 1. *m.* 24. *dors.*

If the goods of a friend be carried in an enemy's ſhip, although the ſhip be taken, the goods of the friend were to be reſtored, unleſs they were proviſions or ammunition of war. But the law was altered in England by a temporary law made only for three years *Rot. Parl.* 14. *H.* 6. *n.* 24. and afterwards made perpetual by *Rot. Parl.* 20. *H.* 6. *n.* 18. ſt. 20. H. 6. cap. 1. viz. that if any goods are taken by Engliſh upon the ſeas charged in any ſhip belonging to the king's enemies not having letters of ſafe conduct enrolled, there be no reſtitution of the ſame goods to any perſon whatſoever friend or enemy.

If war be proclaimed by England againſt France or other kingdom, the merchants or their goods that are here are not to be ſeized as goods of enemies, unleſs our merchants there be ſo uſed; and that by *Magna Carta, cap.* 30. *et ſi ſint de terrâ contra nos guerrinâ, et tales invocantur in terrâ noſtrâ in principio guerræ, attachientur ſine damno corporum ſuorum vel rerum, donec ſciatur, quo modo mercatores terræ noſtræ tractentur in terrâ contra nos guerrinâ; et ſi noſtri ſalvi ſunt ibi, alii ſalvi ſint in terrâ noſtrâ**. But if a foreign merchant in enmity come hither after the war proclaimed, he hath not this protection.

5. Concerning priſoners taken in warr, and to whom they belong. *Vide Regiſter* 102. *Clauſ.* 7. *E.* 3. *par.* 1. *m.* 15. *dorſo*, *Clauſ.* 27. *H.* 3. *par.* 1. *m.* 1.

* For Lord Hale's further obſervation on this chapter of *Magna Carta*, ſee his Hiſt. Pl. C. v. 1. p. 95.—EDITOR.

CONSIDERATIONS

TOUCHING THE

AMENDMENT or ALTERATION of LAWES.

BY

LORD CHIEF-JUSTICE HALE.

[This Treatiſe is noticed by biſhop Burnet in his liſt of lord Hale's works. The manuſcript, from which it is extracted, forms part of a collection of manuſcripts by lord Hale in three volumes in folio. Theſe belonged originally to lord chancellor Somers's library, and afterwards to ſir Joſeph Jekyll, late maſter of the Rolls, who married one of lord Somers's two ſiſters and coheirs. Since ſir Joſeph Jekyll's death, the three volumes came into the hands of his great nephew Joſeph Jekyll, eſquire, barriſter at law; who moſt obligingly gave the uſe of them to the editor. By an entry before one of the pieces, it appears, that it was copied in 1690 from the original in lord chief-juſtice Hale's own hand-writing, with the leave of his grandſon Matthew Hale of Lincoln's-inn, eſquire; and in another, ſir Robert Southwell is named as the perſon to whom the manuſcript was lent for that purpoſe.]

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CONSIDERATIONS

TOUCHING THE

AMENDMENT or ALTERATION of LAWES.

CAP. I.

Concerning the ſeveral extreames relating to the amendment and alteration of lawes; and therein touching the extreame in the exceſſe of overhaſtineſs and forwardneſs to alterations in lawes.

THE buſineſs of amendment or alteration of lawes is a choice and tender buſineſs, neither wholly to be omitted when the neceſſity requires, and yet very cautiouſly and warily to be undertaken, though the neceſſity may, or, at leaſt, may ſeem to require it.

And that I may the more evènly guide myſelf in this diſcourſe, I ſhall begin with the conſideration of both thoſe extreames, viz.

I. The error in the exceſs, the over-buſy and haſty and violent attempt in mutation of lawes under pretence of reformation.

And, II. the error in the defect, a wilfull and over-ſtrict adhering in every particular to the continuance of the lawes in the ſtate we find them, though the reformation of them be never ſo neceſſary, ſafe and eaſy.

Touching the firſt of theſe, the offence of error in the exceſs: and therein I will firſt conſider the dangerouſneſs of this temper in men to be over facile in the change or alteration of the lawes; and then I will examine, upon what reaſons or pretences, or indeed infirmities, men are uſually carried to this ficklenes and unſteadineſs in relation to lawes.

Touching the danger and inconvenience of over much haſtineſs in changing of old lawes, and introducing of new, there be theſe conſiderations, that render ſuch diſpoſitions and ſuch attempts very dangerous.

1. Every

1. Every law that is old hath this advantage over any new law, in that it is better known already to the people who are concerned in it, than any new law poſſibly can be without ſome length of time; by means whereof it muſt needs come to paſs, that though a new law be poſſibly as good, and it may be in ſome degree better than the old, yet many great inconveniencies happen in that interval, which will occur between the promulgation of the new law, and the full and perfect knowledge thereof, in thoſe who are concerned in that law: and if there were no other advantage of the continuance of old lawes above the introducing of new but this, yet it ſhould make people very ſhy and careful in changes, and moſt perfectly to demonſtrate, that the advantage of the change would be ſo great, that it would preponderate this very ſingle conſideration, viz. the notoriety of the old and the novelty of the new.

2. It is moſt certain, that time and long experience is much more ingenious, ſubtile and judicious, than all the wiſeſt and acuteſt wits in the world co-exiſting can be. It diſcovers ſuch varieties of emergencies and caſes, that no man could ever otherwiſe have imagined. It diſcovers ſuch inconveniencies in things, that no man would otherwiſe have imagined. And on the other ſide, in every thing that is new, or at leaſt in moſt things, eſpecially relating to lawes, there are thouſands of new occurrences and intanglements, and coincidencies, and complications, that would not poſſibly be at firſt foreſeen. And the reaſon is apparent; becauſe lawes concern ſuch multitudes, and thoſe of various diſpoſitions, paſſions, wits, intereſts, concerns, that it is not poſſible for any human foreſight to diſcover at once, or to provide expedients againſt, in the firſt conſtitution of a law.—Now a law, that hath abidden the teſt of time, hath met with moſt of theſe varieties and complications; and experience hath in all that proceſs of time diſcovered theſe complications and emergencies, and ſo has applied ſuitable remedies and cures for theſe various emergencies. So that in truth antient lawes, eſpecially, that have a common concern, are not the iſſues of the prudence of this or that council or ſenate, but they are the production of the various experiences and applications of the wiſeſt thing in the inferior world; to wit, time, which as it diſcovers day after day new inconveniencies, ſo it doth ſucceſſively apply new remedies: and indeed it is a kind of aggregation of the diſcoveries, reſults and applications of ages and events; ſo that it is a great adventure to go about to alter it, without very great neceſſity, and under the greateſt demonſtration of ſafety and convenience imaginable.

3. An

3. An overbuſy meddling with the alteration of lawes, though under the plauſible name and pretence of reformation, doth neceſſarily introduce a great fluidneſs, lubricity and unſteadineſs in the lawes, and renders it upon every little occaſion ſubject to perpetual fluxes, viciſſitudes and mutations. When once this law is changed, why may not that which is introduced be changed, and ſo onwards in perpetual motion? So that poſſibly in the period of an age or two, the law of a kingdom, and with it it's government, may have as many ſhapes as a ſilkworm hath in the period of a year; ſo that they that now live, cannot project under what laws their children ſhall live, nor the child or grandchild underſtand by what laws the kingdom was governed in the time of the father or grandfather; and thereby the conſtitution of the government, the rules of property, and all things that are concerned to have the greateſt fixedneſs that may be, ſhall become as lax and unſtable, as if every age underwent a conqueſt from a foreign ſtate. And therefore in all times, the wiſeſt lawgivers and counſellors have been ever careful to keep the ſettled laws of a kingdom, as ſteady and faſt as might be; and hence it was, that, not ſo much to gain obſervance as firmneſs to their lawes, they were always ſtiled ſacred, and the people induced into a venerable eſteem of them, by a pretence that their lawes were given from heaven, and therefore not to be changed by any inferior authority.

4. Overmuch tampering with, and changing of lawes, which have obtained by long uſe and cuſtome, is commonly very ungrateful and unacceptable to the people, into whom their ancient laws and cuſtomes are twiſted and woven as a part of their nature, and introduceth jealouſies and ſuſpicions of deſigns upon them, and gives a handle to buſy and turbulent ſpirits, to inſinuate unto them the bad conſequences that may enſue upon ſuch change, and oftentimes begets ſeditious rebellions and tumults, and prepares people's minds for diſtempers. And though poſſibly at the firſt changes may be uſhered in with plauſible pretences and quiet, and poſſibly pleaſe the multitude with wonderful expectations of good and benefit thereby; yet, when they find themſelves diſappointed, and poſſibly ſome unexpected inconvenience emergeth upon the change, then preſently the mouths of people are opened againſt innovation, and the higher their expectation is raiſed upon the pretence and promiſe of benefit, the more they are enraged by any though inconſiderable diſappointment therein.

Upon theſe, and many more weighty conſiderations, the wiſeſt men in all times have been very tender and jealous of changes of lawes. And upon this account, though when William the firſt came in, he introduced here in England many parts of the Norman

Norman cuſtoms and laws; yet when things began to ſettle, he found it not only convenient but neceſſary to reſtore unto the people their old laws; eſpecially thoſe that obtained upon the account and reverence of Edward the Confeſſor. And when in the time of H. 3. the clergy endeavoured, but in one point, viz. that of baſtardy, to introduce the eccleſiaſtical lawes, the nobility ſtoutly and reſolutely anſwered, *Nolumus leges Angliæ mutari.*

Therefore it is of great importance upon any alteration of the lawes to be ſure,

1. That the change be demonſtrable to be for the better, and ſuch as cannot introduce any conſiderable inconvenience in the other end of the wallet.

2. That the change, though moſt clearly for the better, be not in foundations or principles, but in ſuch things as may conſiſt with the general frame and baſis of the government or law.

3. That the changes be gradual, and not too much at once, or at leaſt more than the exigence of things requires.

CAP. II.

Touching the reaſons and grounds, that ordinarily move men to this exceſs, and itching after changes in laws.

I HAVE in the precedent chapter conſidered the firſt extream, and the danger and inconvenience of it. I ſhall now examine, what are thoſe humours in men, that commonly breed this diſeaſe and inſtability in men in relation to the change of lawes. And upon a due conſideration thereof, we ſhall the better ſee what perſons, what tempers and diſpoſitions, and what times are at leaſt unſeaſonable and unfit for ſuch propoſals; and gather thereby a prudent jealouſy, when we ſee changes uſhered in by ſuch perſons or diſpoſitions, or at ſuch ſeaſons or times, though the pretenſions may be plauſible.

(1.) As the nature of man generally is affected with novelty, ſo there are ſome perſons and diſpoſitions, that are wonderfully fond of it, and rather than want it will have it even in thoſe things which are moſt ordinarily perniciouſly hurt by it. Such are the form of government and ancient municipal lawes. The very ſame itch of novelty and innovation, that carries ſome diſpoſitions to novelty in garbs and geſtures, or to new faſhions in cloathes;

cloathes; carries ſuch when they happen to be in place to innovations and new faſhions in lawes; a certain reſtleſsneſs and nauſeouſneſs in what they have, and a giddy humour after ſomewhat which is new, and poſſibly upon no other account but becauſe it is new, or poſſibly upon ſome over expectations of the benefit of ſuch change, though they have no full nor perfect notion of what is to be introduced in the place of what they nauſeate.

(2.) A ſecond ground of it is poſſibly ſome perſonal miſchief, that they in their own particular have received by the preſent conſtitution of lawes. For there is in mankind a paſſionate ſelf-law, which makes men think, that whatſoever croſſeth them in their intereſt or concern is unjuſt and fit to be altered. And upon this account it will be impoſſible for any law to be ſtable; for laws are not fitted for perſons, but for things, and muſt of neceſſity diſpleaſe or prejudice the intereſt of one partie. That, which may be preſerves the right and property of one man, may and muſt of neceſſity croſs and thwart that which another man miſtakenly thinks or calls his right: and if upon a peeviſh, diſcontented humour, every man that is croſſed by a law muſt be ſtudying of alterations, there muſt be no law at all; for poſſibly that very new law, that ſuch a diſcontented perſon would introduce, will one time or other do him miſchief; or if it do not, yet it may do another man a miſchief in his concern, and will as much juſtify him in a new innovation as it could the other in the laſt.

(3.) A third ground of precipitate and inconſiderate innovation in lawes, is the want of a due conſideration of the true ſtate and nature of all human affairs, eſpecially in that of lawes and government, viz. a conceit of a poſſibility of framing ſuch laws and conſtitutions, as might be faultleſs, and exquiſitely accommodate to the concerns of the whole community, and of every member of it. And hence if there once occur any inconvenience in a law, preſently away with it, and a new frame or model muſt be excogitated and introduced, and then all will be well. But this is a great error; for it is moſt certain, that when all the wiſdom and prudence and forecaſt in the world is uſed, all human things will ſtill be imperfect. There is no wiſdom or counſel perfect, but the wiſdom and counſel of Almighty God, who hath infinite knowledge to foreſee all poſſible emergencies, and hath infinite wiſdom to accommodate and fit every thing according to its neceſſity and conveniency, and infinite power to bow and bend every thing to the determination of his own moſt wiſe counſel and will. And if it could be ſuppoſed that any human contrivance could be perfect and faultleſs (as poſſibly ſome

may be very accurate, as we ſee in mechanical works); yet it is not poſſible, that any human law can be perfect and faultleſs. No. Time itſelf, that as we have ſaid is wiſer than all the co-exiſting wits in the world, is not able to foreſee a perfect law that will be abſolutely faultleſs. And the reaſon is apparent; becauſe it concerns the manners of many men, which are ſo various, uncertain and complicated, both in themſelves and the circumſtances adhering to them, that they are not poſſibly to be exactly fitted. We ſee in the concerns of one man, how various his actions, his paſſions, his concerns are; how they change every moment; what new circumſtances adhere to them to-day that did not yeſterday: and if the ſtate of things be ſo various and complicated in one man, how various, intricated and perplexed will they be with a multitude of men! And if they are various in reſpect of a multitude of men, how various will they be with a multitude in various ſucceſſions of ages, and the occurrences or emergencies thereof! And lawes are made in relation to ſuch multitudes in ſuch ſucceſſions, to which it is impoſſible that it ſhould perfectly be fit and accommodate. If it be ſquared, ſo that it fit *ut plurimum*, and doth more good, though it poſſibly *pro hocuc et nunc* may do ſome harm, yet it is a good law. And beſides, according to new emergencies, if they are of moment and importance, there may be ſome new appendications put to it without a total alteration of the law; ſuch alterations, as do not ſo much conſtitute a new law, as amend the old; ſo that it ſtill morally continues the ſame law, notwithſtanding theſe appendications, as the Argonauts' ſhip was the ſame ſhip at the end of their voyage as it was at the beginning, though there remained little of the old materials but the chine and ribs of it.

And now poſſibly ſome may ſay, that ſince all human laws are imperfect, and only the counſells and determinations of Almighty God are perfect, why then may we not take a ſhort compendious courſe, and take in the judicials given by God by the hand of Moſes, and ſo avoid that inconvenience of the imperfection of human lawes, the poſitive judicial law of Almighty God being ſubſtituted in the place of all other human lawes, and all human lawes abrogated and exterminated?

To this I ſay, that moſt certainly the judicial law given by Moſes was the law of God, and conſequently a moſt perfect law, according to the uſe and end for which it was deſigned; a law of perfect wiſdom, as being the production of an infinite wiſdom. But yet this muſt be obſerved in relation to the perfection of things of this kind. That is in truth perfect, that is perfect in relation to its uſe and end, *cui nihil deeſt* that may be uſeful

and

and appoſite to that end. And if a man be to fit any thing to the uſe of any other particular thing, and for a certain determinate time, that is ſaid to be perfect, that is perfectly fitted to that uſe and duration, though it be not fitted to another thing or a longer duration; for that were a kind of imperfection, becauſe it would be redundant and ſuperfluous.

This being premiſed, I ſay,

1. Although the moral law, or the law of the two tables, were materially univerſal both in reſpect of extent and duration, and therefore, the uſe being of that amplitude, the divine wiſdom fitted it according to the uſe and extent thereof, both in reſpect of all people and ages; yet the judicial lawes, as likewiſe the ritual or ceremonial, were never in the deſign of Almighty God intended farther than that people to whom they were given, and no longer poſſibly to that people than the ſtate of that republic continued. It was indeed exactly accommodate to the ſtate of that people to which it was given; and therein the wiſdom of God is not only juſtified, but manifeſted and exalted; for it was exactly ſuitable to the end it was deſigned. But we cannot ſay it was fitted, or that there was any need it ſhould be fitted for another people; for that was not within the deſign of Almighty God. And this indeed is a circumſtance that ought to be an ingredient in the due conſtitution of all laws, that they ſhould be accommodate to the condition, conſtitution, and exigence of the people to whom they are given. Conſequently, inaſmuch as there be things, peculiar and proper to the ſtate and condition of one people, that are not common to the ſtate of another, nay not of the ſame people at another time; hence it is ſcarce poſſible to frame one judicial law for all people; or if it were poſſible, yet it were not prudent, becauſe inconvenient. Let any man but conſider the judicials given to the Hebrews, he will find them in a ſpecial manner accommodated and attempered to the ſtate of that people, which would not be appoſite to the ſtate of another people; as ſome of their judicials, that referred to the diſtributions of their poſſeſſions, to their diſcrimination from the reſt of mankind, to the redemption of their poſſeſſions, and keeping them with in their tribes, to their late ſtate of captivity amongſt the Egyptians, and the extermination of their practices uſed in Egypt. And divers other particular reaſons, purely concerning that ſtate and unapplicable to another, were the moſt wiſe and juſt foundations of divers of their laws. But yet theſe judicials, that were given to them that were not upon an appropriate reaſon delivered to them, and that are conſiſtent with the frame of the conſtitutions of other nations, have been as far as may be tranſcribed into, as it were, the judicials of other people, at

leaſt ſince the Chriſtian religion obtained, as the laws touching the degrees of marriage, touching murder, and other things.

2. But yet farther it is to be obſerved, that even in that very people, although the text of the judicial law was that which was the baſis and rule of their government and policy, yet the wiſdom of Almighty God, even in the very giving of that law, and divers times after upon variety of emergencies, inſtituted a clauſe for the accommodation of things in the ſame ſtate, according to the exigence of things and emergencies, viz. the great council of that people their Sanhedrim, and the governors of that people their kings, which were authorized by Almighty God, as the exigence of things required, in the civil or political adminiſtration, though not to change the judicials given by God by the hand of Moſes, yet to diſcriminate, ſupply, and provide for new caſes and emergencies. So that Almighty God in his infinite wiſdom did find, that there was a neceſſity of ſupplementals even in his own ſtate, according as ſucceſſion of time and various emergencies might occur, and even during the conſiſtency of that policy or republick.

3. Upon the whole therefore, I conclude, that that law was contrived with moſt perfect wiſdom for that people, and during that ſtate; and therein conſiſted in a great meaſure the wiſdom of it in that accommodation. But to tranſlate that law to another people, to whom it was not accommodate, were a wrong to the divine wiſdom. It is moſt certain, the ſpecifical natural law that is given to birds, is moſt wiſely accommodate to them by the divine wiſdom. But for any man to ſay, becauſe it is a moſt wiſe law, therefore it were fit to be uſed by beaſts or fiſhes, were to diſtort and wrong the divine wiſdom, by miſapplying it to ſuch a uſe, and ſuch animals, for whom it was never intended to be a rule or law. And though the ſpecifical nature of Jews and Gentiles, and all nations be the ſame, yet it is certain, that there ever were, and ever will be, great variety in the ſtates, diſpoſitions, and concerns of ſeveral people; ſo that that law, which would be a moſt wiſe, apt, and ſuitable conſtitution to one people, would be utterly improper and inconvenient for another.

(4.) A fourth ground of, or rather temptation to, a precipitate alteration of lawes already made, is the ignorance of the lawes that are ſo intended to be altered, in theſe that are fond of ſuch alteration; and this ignorance of the lawes, provokes an alteration upon theſe occaſions.

1. It irritates and provokes men to be angry, againſt that which they do not know, nor poſſibly cannot, without the expence of ſo much pains and time as men are not willing to ſpare for the acqueſt

of

of that knowledge. And this temptation commonly befalls men of parts and advanced reaſon, or ſuch as think themſelves ſo, and therefore are impatient of and angry with that they do not know. They think the lawes are fooliſh; becauſe if they were reaſonable things, they muſt underſtand them without ſtudy, as they do the force of an argument, or the falacy or ſtrength of a ſyllogiſm or a mathematical demonſtration, or other: and they think their reaſon is much undervalued, if it be told them, the law is reaſon, and the law is thus; and they are preſently apt to ſay, they underſtand reaſon, and blame the law, becauſe they underſtand it not, when they think it is below them to be ignorant of any thing. And upon this account they will become Solons and Lycurgi, and legiſlators, and frame a law, that they themſelves may know and approve, becauſe they make it; and as the Iſraelites in the wilderneſs they would have Gods that they may ſee, that may go before them. And this is a great piece of pride, peeviſhneſs and inconſiderateneſs, yet ſuch as the pregnant wits of the late times, and indeed of moſt times, labour under; for it is apparent that things, that are *ex inſtituto*, though framed with the greateſt wiſdom, cannot be known by the light of reaſon till they are firſt learned and ſtudied; and if thoſe men ſhould compile a body of laws according to their own fancies or judgment, they poſſibly might underſtand them that make them, but others cannot till they have ſtudied and learned them, though they be never ſo much maſters of reaſon.

2. Ignorance of the law prompts men to a readineſs and forwardneſs to alter it; becauſe they have not a full comprehenſion, and thereby many times conceive that to be a default in the law, which is not ſo, but only in the miniſters or officers that judicially or miniſterially exerciſe or execute it; and they take that for an error in the law, which is only a defect or exceſs in the adminiſtration or execution of it.

Again, poſſibly they may eſpy ſomething that may in truth be miſchievous in ſome particular caſe, but weigh not how many inconveniencies are on the other ſide prevented or remedied by that which is the ſuppoſed vicious ſtrictneſs of the law; and he that purchaſes a reformation of a law, with the introduction of greater inconveniencies by the amotion of a miſchief, makes an ill bargain. As I have before ſaid, no human law can be abſolutely perfect. It is ſufficient, that it be beſt *ut plurimum*; and as to the miſchiefs that it occaſions, as they are accidental and caſual, ſo they may be oftentimes by due care prevented without an alteration of the main.

And beſides this, there is that contignation, as I may ſay, of moſt lawes with others, that it may be of great importance, that whilſt men over-haſtily and unwarily go to make an alteration in that

that which they conceive amiſs in a ſmall matter, they may endanger a great part of the main fabrick. As he that will for every ſmall matter be altering of his houſe, as he will ever be meddling and never be at reſt, ſo he may before he is aware endanger the whole fabrick, while out of an over-curious nicety he is impatient of every little defect. The beſt criſis of any alteration is this, that though it may procure ſome inconvenience, yet if it produce an equal convenience, or an inconvenience, but probably, yea or diſputably, greater or equal to what it remedies, ſuch an attempt is without more ado to be rejected. Therefore if in any thing a full comprehenſion and circumſpection of all things that are or that may be is requiſite in any action, it is an alteration in the lawes. As the philoſoper tells us, *Qui ad pauca reſpicit facilè pronunciat.* They, that are but half-ſighted in buſineſs of the law, are more ready with ſpeed and peremptorineſs to pronounce for its alteration, than they that look about them and ſee their whole buſineſs before them.

(5.) A fifth occaſion or temptation to be changing of the lawes is ſomewhat a kin to the former, viz. an over-weening eſteem and valuation, that a man many times hath of ſome pretty new expedient, that his own fancy or the fancy of others hath ſuggeſted for the reformation of ſomething per-chance at leaſt ſeemingly amiſs in the law, without a due deep attentive conſideration of what inconveniencies would attend ſuch ſubſtitution. Indeed oftentimes men are in love with the product of their own heads; and as they have not the patience or impartiality to examine it, ſo they are not willing to hear of any thing that might interrupt the pleaſure of their fancy, or contradict or diſparage it, tho' upon never ſo clear and pregnant a reaſon and evidence. And by this means men, having their minds intent upon what they would be at in this kind, ſeldom diſcover the inconveniencies till they feel them; like boys, that blow a bubble out of a walnut-ſhell, which when it is up, run after it with their eyes fixed only upon their bubble, and never conſider what ditches they fall into or what breaches they run into in their purſuit, till they feel the damage which they had not prudence or patience to foreſee. The truth is, if upon the diſcovery of ſome inconvenience in lawes the buſineſs were only to provide a plaiſter for that ſore, the reformation of any law were very eaſy. But the great buſineſs of a reformer is, not only to ſee that his remedy be appoſite, but that it doth not introduce ſome other conſiderable inconvenience, or at leaſt with the inconvenience that it remedies takes not away ſome other conſiderable convenience, which the former conſtitution before the alteration brought with it. For as I before ſaid, the eſtimate that is to be made,

made, is to be made not upon thoſe ſingle inconveniencies that are remedied, but upon the whole account of profit and loſs, upon the whole cargo, not upon this or that particular commodity; for ſtill we muſt remember, that the wiſdom and prudence of a long tract of time and experience hath made a kind of aggregation and contignation in the fabrick of lawes. One piece is for the moſt part ſubſervient unto and mortiſed in another, as the frame of a ſhip or houſe is, at leaſt when principals are concerned. And therefore there muſt be a great knowledge and a vaſt circumſpection in every conſiderable alteration of the law.

(6.) A ſixth occaſion or temptation to alter the law are certain paſſions in men; and becauſe they are of ſeveral kinds, but yet all reducible to the ſame head, I ſhall enumerate the moſt conſiderable, and ſo conclude this chapter.

1. Vain glory.—Men are fond to be enrolled in the number of legiſlators with Solon, Lycurgus, Numa, and others; and would be tampering upon that account to get a name.

2. Ambition.—Commonly the firſt ſtep of ambitious men, and one of the moſt popular and taking to lift themſelves up to place and power, is with Abſalom to be reforming the conſtitution or adminiſtration of the lawes.

3. Fear.—When men have achieved great power by uſurpations or other undue means, the firſt thing they ordinarily attempt is reformation of lawes; partly *ad faciendum populum*; partly to remove ſuch lawes as ſit too hard and uneaſy upon their uſurped power; but principally to engage the generality of men in the acting under new lawes, and holding their intereſt and properties under them, and thereby they may be engaged in a common defence againſt the true and juſt power, leſt upon return of things into their ancient channel the repeal of ſuch acts and intereſts derived under ſuch lawes may enſue.

4. Envy and malice at the profeſſors and profeſſion of the law; and that upon theſe accounts, upon the account of their wealth, power, number, wiſdom, and the neceſſary uſe of them. Men hate thoſe either they fear, or that have a great advantage either of eſteem for wiſdom and knowledge above themſelves: and this very envy at the profeſſors many times diſcover itſelf againſt the law they profeſs, in contriving new ſyſtems and modells to put their hands out that they think at preſent in; though this attempt commonly ſucceeds to the authors with the like diſadvantage, as the conſpiracy of the limbs againſt the ſtomach: they weaken and ſometimes deſtroy themſelves in the attempt.

CAP.

CAP. III.

Touching the other extream, the over tenacious holding of lawes, notwithſtanding apparent neceſſity for and ſafety in the change; the danger and occaſions thereof.

BY what hath been ſaid in the two preceding chapters, a man would ſuppoſe, that all alterations, amendments, or reformations, of municipal lawes, were wholly to be interdicted; and no room left for it with ſafety or prudence; but what hath been once ſettled for law muſt ſtand everlaſtingly without any reformation or alteration; and that men were better to live under the inconveniencies of an old law, than undergo that hazard and inconvenience, which may incurr by any amendment or ſuperinduction of any new lawes.

And accordingly many wiſe and excellent men have laboured, and ſtill do labour under this extream; and the motives, reaſons or temptations to this extream ſeem to be ſuch as theſe:

1. By long uſe and cuſtom men, eſpecially that are aged and have been long educated in the profeſſion and practice of the law, contract a kind of ſuperſtitious veneration of it beyond what is juſt and reaſonable. And it happens to them as it doth to the Romaniſts in point of religion, in relation to ancient rites and ceremonies tranſmitted to them from their anceſtors, that, though they become overburthenſome by their multitude, or ridiculous by their vanity or impertinency, or antiquated by the alteration of the ends and uſes for which they were at firſt inſtituted or introduced, yet they are zealouſly retained, though to the apparent detriment and oppreſſion of religion itſelf. And accordingly it happens to theſe men in point of lawes. They tenaciouſly and rigorouſly maintain theſe very forms and proceedings and practices, which, tho' poſſibly at firſt they were ſeaſonable and uſeful, yet by the very change of matters they become not only uſeleſs and impertinent, but burthenſome and inconvenient and prejudicial to the common juſtice and the common good of mankind: not conſidering the forms and preſcripts of lawes were not introduced for their own ſakes, but for the uſe of public juſtice; and therefore, when they become inſipid, uſeleſs, impertinent, and poſſibly derogatory to the end, they may and muſt be removed.

2. An over-jealous fear, that it may be poſſible, that ſome unthought-of inconvenience may emerge, which may introduce ſome unexpected miſchief to the community, and with it a diſpa-

ragement

ragement to the judgment of thoſe that are undertakers in it. And this lion in the way choaks all induſtrious application to this moſt neceſſary buſineſs. Indeed this very fear muſt make men that have to do in this important affair the more conſiderate and circumſpect, the more adviſing and deliberating, the more ſolicitous and careful, and the more mature and to take the longer time in their reſults, but muſt not wholly obſtruct the work itſelf, when the public neceſſity and good calls for it.

3. A timorouſneſs to diſpleaſe and diſoblige great officers and miniſters of juſtice, eſpecially ſuch as have paid dear for places of this nature (one of the greateſt banes to juſtice and neceſſary reformation); for it muſt needs follow upon a due reformation of what is amiſs, that ſome offices muſt be laid aſide as needleſs, others pared from their redundancy. And it is true, thoſe that are concerned in point of intereſt in ſuch reformation, will be ſprightfully watchfull to ſee if any thing of inconvenience may emerge upon ſuch alterations; and they will be ready to inculcate it with diſadvantage enough to ſuch as ſhall be inſtrumental therein. And if they find the leaſt imaginable default (as it is impoſſible but ſome ſuch thing may evene) they will induſtriouſly magnify and aggravate it beyond the bounds of truth or prudence. It is a little petty revenge they pleaſe themſelves withall. But I ſhall not need to decry ſuch a pitifull puſillanimity or narrowneſs of mind, that will neglect a publick important good, either becauſe it may create ſome advantage to themſelves in point of profit, or to thoſe who hold places of advantage in courts of juſtice or relating thereunto.

4. A jealouſy, leſt any thing offered for the amendment of what is amiſs in the law may give a handle to others to ravell into the whole frame of it, and to be tampering with it to the publick detriment; and ſo that which is intended to perfect and advance the law ſhall be uſed like a little wedge put into a great piece of timber, which ſhall give opportunity to violent perſons to drive greater after them, and cleave the whole in pieces.

And indeed this often falls out in great aſſemblies, eſpecially if times be not very ſedate when any thing of this nature is offered. Perchance one grafts upon it ſome thing elſe, and a ſecond a ſecond thing, and a third a third; whereby the ſole deſign at firſt is loſt, and ſomething, or it may be many things, produced, pernicious both to the law and government. But this may be with care and vigilence prevented, eſpecially as our legiſlative conſtitution is eſtabliſhed. There be ſeveral halts and ſtops before a law of this nature be perfected, whereby at any of which ſuch an inundation, if it ſhould happen, may be obſtructed

ſtructed; and that which is good and neceſſary be carried on, as I ſhall have occaſion to mention hereafter.

5. Exemplary miſcarriages, in the late times, of ſuch as have undertaken reformation both in matters civil and eccleſiaſtical, hath brought a diſrepute upon the undertaking of any reformation in either: ſo that the very name of reformation and a reformer begins to be a ſtile or name of contempt and obloquy; ſo that men are as fearfull to be under the imputatſon of a reformer of the law, as they would be of the name of knave or fool, or hypocrite.

And upon theſe and the like accounts it fares with the law, and the ſages thereof as to the point of reformation of the law, as it did with the preſent age and the *virtuoſi* of Parnaſſus in Bocaline. They dare not meddle with it, but let it live as long and as well as it can in the ſtate they find it. Only to ſave their credits upon ſuch occaſions, they meddle with ſome little inconſiderable things, as they ſet the price upon turnips and carrot ſeed; but nothing is dared to be done of uſe and importance.

But notwithſtanding all theſe difficulties and obſtructions, I think good and wiſe men may and ought to make ſome prudent eſſay even in this great buſineſs, and with very good ſucceſs both to their own reputation and the publick benefit. And in order to the encouragement therein, I ſhall propound theſe conſiderations:

1. We are not without excellent and happy examples of reformation in this kind to the general good and advantage of mankind; yea, and for the very preſervation of the lawes themſelves, which without due huſbandry of them will die of themſelves, like trees that want pruning.

The Roman empire was not only ſignal for its amplitude, power, wiſdom, and ſucceſs, but in a ſpecial manner for its lawes. Yet in the proceed of 1300 years they grew ſo perplexed, voluminous and intricate, that there was a neceſſity of a reformation of them. The buſineſs was undertaken by Juſtinian the emperor, and committed to about twenty excellent counſellors and lawyers, Trebonianus being the chief of that college. There were then extant above two thouſand volumes of that law, and above thirty hundred thouſand paragraphs in verſicles; and among thoſe divers contradictory lawes, very many laws touching one and the ſame thing, very many laws obſolete and out of uſe and practice. All theſe laws were reviſed, corrected, and amended by thoſe noble lawyers, and ſo much as was uſeful reduced into thoſe three volumes which we now call *Corpus Juris Civilis*, viz. the Inſtitutes, Digeſt, and Code or book of Statutes; and this done in the ſpace of three years, as appears by the narrative of this buſineſs in the code *ſub titulo de veteri jure enucleando*,

do, worth any man's reading. Somewhat of the like nature was done by Gratian in his *Decretum*, by Innocent in his Decretalls, and by *Sextus* * and the Extravagants in the cannon law.

But we ſhall not need, nor is it indeed pertinent, to bring in foreign examples. Our own country affords us moſt apt inſtances.

Edward the firſt, a moſt wiſe, powerful and valiant prince, our Engliſh Juſtinian, did make as many, and as great and as happy alterations and reformation of lawes, as might be. If we look upon Wales, he took a ſtrict examination of all the laws of that country after he had ſubdued it, eſpecially thoſe of Howell-Dha, the great Britiſh Lycurgus; and he made a moſt excellent alteration and amendment of the whole ſyſtem of their law, as appears by the ſtatute of Ruthland 12. Ed. I. And concerning the reformations of the Engliſh lawes, let any man but read the ſtatutes of his time, he will find as great, yet as happy, alterations, as almoſt can be imagined. Let us but take an eſtimate of ſome. By the ſtatute of Gloceſter he gave an action of waſt, where none before lay; and he fixed the juriſdiction of great courts to 40*s*. and upwards. By the ſtatute of Weſtminſter the 2d, he altered the nature of eſtates of fee conditional at common law, which bred a great change. He ſettled the proceeding in ward, *quare impedit*, replevins, writs of meſne; gave *ſcire facias* and *elegit* where none was before; took away age *in cui in vita*; gave a *quòd ei deforceat* where none lay before; took away the effect of a collateral warranty in ſome caſes without aſſets; gave receipt to the wife and him in reverſion upon default; took away eſſoins in many caſes; and made divers other notable alterations, which turned about a conſiderable part of the adminiſtration of lawes; and by the 24th chapter gave an outlet to ſupplemental remedies upon new emergencies, *ne contingat, quòd curia regis deficiat conquerentibus in juſtitiâ*. Again, he prohibited the alienation of lands in mortmain; made the country liable to anſwer for robberies committed; prohibited the new creating of tenures; and limited the juriſdiction of the eccleſiaſtical courts, and of the Marſhalſea and other courts. Theſe and many more acts made a very great alteration in the law, and to very good purpoſe.

In the time of Ed. 3. non-claime upon fines taken away; pleadings in Engliſh; fraudulent conveyances remedied; executors of executors enabled to ſue; actions given for executors of goods taken away in the teſtator's life-time; and many others.

Paſs we over the many alterations of the law in the time of the intermediate kings, and come to H. 7. Then fines with proclamations to bar entails, and ſo in part to repeal the ſtatute of Weſtminſter the 2d; proviſions to charge the lands of *ceſtui que uſe* with wardſhips, ſtatutes, &c.

* The Sixth Book of the Decretals is meant.—EDITOR.

In

In the time of H. 8. the changes were yet greater than in any time after Ed. 1. For firſt, as to Wales, he new-modelled the frame of it's government by the ſtatutes 26. 27. and 34. H. 8. Again, as to a very great concern, as I may ſay, the law received a very conſiderable alteration; the ſtatute *de donis conditionalibus* being abrogated as to the attainder of treaſon; all uſes executed into poſſeſſion, eſtates made to paſs by deeds inrolled; fines made more clearly effectual to barr entailes; recoveries in ſome caſes invalidated; atturnement in many caſes rendered needleſs; diſcontinuances of lands in right of the wife removed; entry given againſt deſcents in many caſes; all lands made deviſeable by will, which were not before but by particular cuſtoms; jeofailes and miſpleadings rectified; monaſteries diſſolved.

Theſe and many more conſiderable alterations of the law, made and ſucceſsfully continued to this day, come we down to the time of queen Elizabeth's lawes for amendment, for writs of error upon judgments in the king's bench, againſt fraudulent conveyances, againſt bankrupts. Theſe and many more lawes made very great alterations in the law, yet without any ſuch diſmal effect, as the melancholy objectors would ſuppoſe, but very happy and uſeful for the public good. And the reaſon was, becauſe wiſe men had the management of theſe great changes; they were not done raſhly, nor haſtily, nor inconſiderately, but upon due and weighty advice and conſideration; and they have been practiſed ſucceſsfully. The truth is, for theſe laſt forty years, little hath been done of this kind; the times were tumultuous and not ſeaſonable for it; and indeed there is the more need by reaſon of that intermiſſion and chaſma, that ſomewhat of this kind ſhould be done.

The ſecond conſideration is this, as all ſublunary things are ſubject to corruption and putrefaction, to diſeaſes and ruſt, ſo even lawes themſelves, by long tract of time gather certain diſeaſes and excreſcences; certain abuſes and corruptions grow into the law, as cloſe as the ivy unto the tree, or the ruſt to the iron, and in a little tract of time gain the reputation of being part of the law. So that a great and conſiderable part of that reformation, that is pleaded for, is not ſo much of the law, as of abuſes and corruptions, and wens and excreſcences, and delays and formalities and exactions, that do adhere to the law, and will in time ſtrangle and ſtifle it with its cloſe adherence to it. And when theſe dear and profitable exuberances, and ulcers are looked after, preſently thoſe, that are concerned in the profit thereof, or do not duly diſtinguiſh between the law and it's abuſes and diſeaſes, cry out upon deſtroying the law, and altering of the law, when in truth it is the

reſcuing

reſcuing of the law from thoſe encroachments or abuſes that are made upon it or brought into it.

3. But yet farther, I do not think, that the only things fit to be reformed in the law are the abuſes and corruptions of it; but there are ſome things, that are really and truly parts of the law, as neceſſary to be reformed as the errors or abuſes of it.

And we muſt remember, that lawes were not made for their own ſakes, but for the ſake of thoſe who were to be guided by them; and though it is true they are and ought to be ſacred, yet, if they be or are become unuſefull for their end, they muſt either be amended if it may be, or new lawes be ſubſtituted, and the old repealed, ſo it be done regularly, deliberately, and ſo far forth only as the exigence or convenience juſtly demands it.—And in this reſpect the ſaying is true, *ſalus populi ſuprema lex eſto.* Now lawes become or are unuſefull to their end upon two accounts. 1. When in their very conſtitution and fabrick they are rotten and faulty, and unjuſt, and impoſſible to be born without remarkable and common inconvenience. I ſhall not apply this part to the thing in queſtion.—But 2dly, when a law, tho' never ſo good in its firſt inſtitution, yet by reaſon of ſome accidental emergencies that do moſt uſually happen in tract of time, either becomes obſolete and out of uſe, or weak and unprofitable to its end, or inconſiſtent with ſome new ſuperinduction that time and variety of occaſions have introduced. And as this is moſt clear in all lawes, ſo in our Engliſh lawes we ſhall find, what was in uſe, and poſſibly very effectual in its time, is now deſerted and antiquated, and utterly unapplicable to the preſent ſtate of adminiſtration in England. Glanville wrote a ſyſtem of our Engliſh lawes in the time of H. 2. Bracton in the time of H. 3. Britton in the time of E. 1. Let any man read them, and ſee, whether he can by any means accommodate that adminiſtration to the preſent ſtate of things, or the preſent regiment or order of things to that. Nay, if we come to the year-books of the time of E. 3. any man, that knows any thing in this kind, will moſt certainly find, that it cannot fit us; for where is there now one aſſiſe or real action brought, unleſs where they have no other remedy? So that the ſtream of things have, as it were, left that channell, and taken a new one; and he, that thinks a ſtate can be exactly ſteered by the ſame lawes in every kind, as it was two or three hundred years ſince, may as well imagine, that the cloaths that fitted him when he was a child ſhould ſerve him when he is grown a man. The matter changeth the cuſtom; the contracts the commerce; the diſpoſitions, educations and tempers of men and ſocieties change in a long tract of time; and ſo muſt their lawes in ſome meaſure be changed, or they will not be uſefull for

their

their ſtate and condition. And beſides all this, as I before ſaid, time is the wiſeſt thing under heaven. Theſe very lawes, which at firſt ſeemed the wiſeſt conſtitution under heaven, have ſome flawes and defects diſcovered in them by time. As manufactures, mercantile arts, architecture and building, and philoſophy itſelf, receive new advantages and diſcoveries by time and experience; ſo much more do lawes, which concern the manners and cuſtomes of men.

All that, which I contend for in the firſt and ſecond chapter, is, not to render lawes of men like lawes of nature fixed and unalterable, but that it be done with great prudence, advice, care, and upon a full and clear proſpect of the whole buſineſs.

4. But yet further, by length of time and continuance lawes are ſo multiplied and grown to that exceſſive variety, that there is a neceſſity of reduction of them, or otherwiſe it is not manageable; as we have before obſerved touching the Roman lawes, which in a tract of 1300 years grew to 2000 great volumes. And the reaſon is, becauſe this age for the purpoſe received from the laſt a body of lawes, and they add more and tranſmit the whole to the next age, and they add to what they had received and tranſmit the whole ſtock to the next age. Thus as the rolling of a ſnow-ball, it increaſeth in bulk in every age, till it become utterly unmanagable. And hence it is, that even in the lawes of England we have ſo many varieties of forms of conveyances, feoffment, fines, releaſe, confirmation, grant, attornment, common recovery, deeds, enrolled, &c. becauſe the uſe coming in at ſeveral times, every age did retain ſomewhat of what was paſt, and added ſomewhat of it's own, and ſo carried over the whole product to the quotient. And this produceth miſtakes. A man perchance uſeth one ſort of conveyance, where he ſhould have uſed another. It breeds uncertainty and contradiction of opinion, and that begets ſuits and expence. It muſt neceſſarily cauſe ignorance in the profeſſors and profeſſion itſelf; becauſe the volumes of the law are not eaſily to be maſtered.

5. There be in the law to this day ſomethings continuing, which, though poſſibly of ordinary uſe or occurrence, yet are miſchievous when they come to be uſed, and would not at all be miſſed if taken away, and which I ſhall in the purſuit of particulars evidence to the ſatisfaction I believe of every knowing, conſidering and unprejudiced mind.

6. I ſhall add but this one thing more, that it may juſtly be feared, that if ſomething conſiderable for the reformation of this amiſs in the law be not done by knowing and judicious perſons, too much may ſome time or other be done by ſome, either out of envy at the profeſſors, or miſtaken apprehenſions or popular humours.

humours. The amendment of things amiſs timely by knowing, able and judicious men that underſtand their buſineſs, may do very much good, and prevent very much evill that may otherwiſe enſue; and when the buſineſs is begun by ſuch hands, it may poſſibly be too late to allay it. And although it be true, that as the legiſlative power is eſtabliſhed there be many reſerves to prevent or ſtop ſuch an inundation, yet we know not how high the publick neceſſities of ſupplies may ariſe, conſidering our many great undertakings in the kingdom: and it is no new thing to obſerve very hard and unreaſonable terms granted as the price and purchaſe of ſupplies, when they cannot be had upon eaſier terms. And it will have this plauſible pretence, that the judges and lawyers will do nothing to the lawes, and therefore it ſhall be done by other hands. Such a humour would be more eaſily prevented by a wiſe and ſeaſonable undertaking in this kind, which would not be ſo eaſily diverted or allayed, if once it ſhould be flying. And thus much ſhall ſerve for this chapter.

CAP. IV.

Some things neceſſarily to be premiſed touching the matter, the manner, the perſons, and the ſeaſon of public undertaking, for a reformation of the lawes.

UPON what hath been ſaid in precedent chapters, it ſeems apparent, that, as on the one ſide ſome things may be fit to be done in relation to the amendment of the lawes, yet on the other ſide it is neceſſary, that exceeding caution be uſed as well touching the matter, as the manner how, and the perſons by whom, and the ſeaſon wherein ſuch a reformation may be made.

There are two extremes before obſerved; and he, that can ſteer his courſe herein between them both, hath attained the magiſtery; only with this caution, that if there muſt be an error, let it be rather in the defect than in the exceſs. We know already the worſt of what is. We know not the worſt of what may be in an exceſs. And therefore, before I come to particulars, I will premiſe ſome general cautions in reference to the matter, manner, perſons, and time or ſeaſon of ſuch an undertaking.

I. For

I. For the matter, that may or may not bear an amendment or alteration, theſe things muſt be obſerved.

(1.) That nothing tend to the alteration of the government in any meaſure; for that were to introduce ruin and confuſion, not reformation; as late and ſad experience hath abundantly evidenced.

(2.) That nothing be altered that is a foundation or principal integral of the law; for theſe are very ſound, and ought not to be touched, leſt the whole fabrick ſhould be endangered. We muſt do herein, as a wiſe builder doth with an houſe that hath ſome inconveniences or is under ſome decayes. Poſſibly here or there a door or a window may be altered, or a partition made; but as long as the foundations or principals of the houſe be ſound, they muſt not be tampered with. The inconveniences in the law are of ſuch a nature, as may be eaſily remedied without unſettling the frame itſelf; and ſuch amendments, though they ſeem ſmall and inconſiderable, will render the whole fabrick much more ſafe and uſeful. But of the particulars in their ſeaſon.

II. Touching the manner and perſons, theſe things are to be obſerved.

(1.) That it be done deliberately and leiſurely. An attentive conſideration will every day ripen the judgement of thoſe that ſhall be employed in ſuch a ſervice farther than they can at firſt imagine.

(2.) Let every point be fully debated and impartially examined, before it fix into a reſolution.

(2.) What can be done by the power and authority of the court and judges, without troubling a parliament for ſuch things. And truly this would go a very great way in the reformation of things amiſs in the law, and ſuch as are of this nature ſhall be obſerved in the particulars hereafter mentioned. For ſometimes it falls out, that an unneceſſary application to parliament, in things that are otherwiſe curable, breeds unexpected inconveniences. What the poet ſaith of miracles I may ſay in this caſe:

Nec Deus interſit, niſi dignus vindice nodus
Inciderit.

(4.) In theſe remedies, that are given by parliament, let it be particular, and as little left *arbitrio judicis* as may be. Upon ſuch a remiſſion, forward men will do too much when much is left to their power; but wiſe and cautious men will do too little. Such a remedy therefore will be hurtful, not uſeful. But wiſe and honeſt men deſire to underſtand their rule; though ſome things are of ſuch a nature, as muſt in the particular application or exerciſe be left to the judges and officers of courts, as the forming and modelling of writs, proceſs, pleadings, and other proceedings, in conformity and ſubſervience of what is to be ſettled by parliament in this behalf.

(5.) Let

(5.) Let no lawes of this nature have a retrospect; but let the time that they shall be put in execution, have such a prospect, as men may not be surprized by the change of things, but may be fitted and prepared for and conusant of it.

(6.) In the preparing and passing of these lawes, I would wish these methods were observed, viz.—1. That it would please the king, with the advice of both houses of parliament, to require the judges and other sages of the law to prepare bills, that may be fit for the reformation of the law against the next session. For as I would not have any man intermeddle in so great business without a most authentic injunction by the king and his supreme council, lest he should come under the prejudice of a busy body or an undertaker; so on the other side, I think, no persons are so fit to be employed in the first digestion of such a business, but such as know what best belongs unto it, and how far may be gone with safety and convenience: and as it were an unworthy thing, especially in a judge, to prefer his own interest or profit, or the interest of the courts or officers of courts, above the public benefit, so it were an unworthy thing to suspect such a business in those, who are interested with the lives, liberties and estates of the people in their judicial employments. 2. Such bills so prepared should be presented to the house of commons in the first place; because they represent in a more special manner the common interest of the people. 3. When such bills are twice read and committed, and have been once or twice particularly debated at the committee, it may be very fit to call the judges to a solemn debate at the committee of the house of commons, where they may give the reasons, why they go so far, and why no further; and that their opinion be asked touching any alterations or amendments offered, and the reasons in relation thereunto; for it many times falls out, that a very good and profitable bill is suddenly spoiled with a word inserted or a word expunged, which would be prevented, if the contrivers of the bill were first heard to it; and thus many a good law is lost, or not retrieved again without many messages and conferrences between the houses. 4. When the bill comes to the lords and is twice read and committed, it were fit, that all the judges attend the committee for the reasons above given. —Bills thus prepared and hammered would have fewer flawes, and necessity of supplemental or explanatory lawes, than hath of late times happened.

And thus I have at once absolved the generals, that relate both to the manner of the reformation and persons by whom.

III. Touching the time or season for such a business, it must be observed, that it is not every parliament that is fit for such a

buſineſs. When either the times are turbulent or buſy, or when other occaſions of ſtate are many, great or important, that is not a ſeaſon for ſuch an undertaking; for it is not poſſible among ſuch hurries of buſineſs, there can be that attendance upon and attention unto a buſineſs of this nature, as in truth it requires. It muſt be in ſuch a time, when there is great tranquility at home and little engagement abroad; that the parliament may reſolvedly, patiently, attentively, and conſtantly apply itſelf to the work. Otherwiſe it will not be at all done, or not half done, or perchance over done, which is worſe than if not done at all.

In the late troubles there was very great earneſtneſs, by thoſe who had gotten the power in their hands, for the reformation of things amiſs in the law. And I do verily believe, that any thing might have been paſſed in that kind, that prudent and knowing men would have offered. Nay, poſſibly there was ſcarce any thing, that could have been offered introductory of any alteration, but would have been greedily ſwallowed. But that, which wiſe and honeſt men do now deſire, they did then induſtriouſly decline; and they did rather chuſe to obſtruct the propoſal, or the paſſing of thoſe things, which poſſibly for the matter of them might be good and uſeful, than any way to promote or advance them. And the reaſons were principally theſe: 1. Becauſe the ſtate and conſtitution of the government was then fixed upon a tottering and unwarrantable baſis; ſo that any laws, that according to the mode of theſe times were paſſed, would be but ſnares to mens actings and eſtates, and involve the generality of men and their eſtates and properties in a very dangerous condition, if ever things returned to their right conſtitution. And we very eaſily found the difficulty of ſettling former things upon the king's return, which would have been infinitely more difficult, if the ordinary method of adminiſtration of courts rules and laws, touching eſtates and properties, had undergone that alteration that was deſired by thoſe that were then in power. 2. Becauſe it was evident, that there would have been no one thing more obſtructive to the king's return than ſuch a courſe; for upon a ſudden, all mens properties, eſtates and aſſurances would have much reſted upon ſuch new laws, and have engaged the community upon an account of their common intereſt to have ſupported that power which introduced thoſe laws, wherein they were ſo much concerned. And the truth was, this was the great reaſon, the myſtery, why reformation of the laws was ſo much deſired by thoſe then in power; and on the other ſide, as induſtriouſly and warily declined and ſhifted off by many good and knowing men that were reſpected in theſe times.

times. The things desired were many of them for the matter good; but the end and design and the state and condition of things would not allow of such an undertaking. And therefore those, that were solicited to undertake that business, rather chose to propound such things only to be done, as might be done by the power of courts of justice, but declined whatsoever required a new law to authenticate it.

But now things are settled upon their right basis, and the parliament returned to its original constitution, the season for aught I know, may be well enough for such an enterprize.

CAP. V.

Concerning the particulars, that would be fitly and safely amended, and in what method they shall be prosecuted.

AFTER this large preamble, I shall now descend to particulars that would require reformation; and that I may proceed the more clearly, and as much as I can avoid omissions of things that are of moment, I shall pursue this method, viz.

I. I shall consider of some inconveniencies in the management of the king's revenue, and the means how to rectify it.

II. I shall consider of the inconveniencies relating to the courts of justice, and the means how to remedy it.*

III. I shall consider the inconveniences in the multiplicity and inconvenience of suits and actions as the present state of things stand, and the means how to remedy it.

IV. I shall consider the inconveniencies relating to the passing and charging of estates in lands, and the means how to remedy it.

V. I shall consider the inconveniencies in pleas of the crown.

VI. I shall consider the inconveniencies in the present collection of statutes and books of the law, and the means how to remedy it.

* This head appears to have been left *imperfect* by lord Hale; the only courts on the inconveniences of which he discourses, being the county court and the court of common-pleas. As to the four following heads, to which his division extends, the particular manuscript from which this treatise is taken, is *wholly* deficient. But in another manuscript of lord Hale on the Amendment of the Lawes, which seems to have been his first essay on the subject, there is a chapter on the books both of the statute and common law, with a view to the reduction and digest of them.—EDITOR.

As near as I can, I ſhall purſue this order; and becauſe the things remediable will be of a mixed nature, I ſhall, as I paſs through particulars, ſhew, what are remediable by the power and agreement of the courts themſelves what by act of parliament. And in purſuance of theſe particulars, I ſhall upon every particular ſhew, 1. The inconveniencies. 2. The remedy. 3. The debate of the conveniencies or inconveniencies of the remedies propounded.

I ſhall, as near as I can, hold to this method; though poſſibly the coincidence of particulars may here and there cauſe me to depart from it. And ſo I proceed to the particulars.

CAP. VI.

Concerning thoſe inconveniencies, that are in the management of the king's revenue, and the remedy thereof.

1. THE king hath ſeveral ſmall rents ariſing diſperſedly, ſome out of whole townſhips, ſome out of particular lands. They are for the moſt part known by theſe names, viz. —1. Vicountiel rents, which ariſe to a pretty ſum, but are ſucceſſively loſt, becauſe they are but ſmall, and not well known where to be levied. Theſe are under the ſheriff's collection, and are for the moſt part within the charge of the pipe.—2. Chantry rents, ariſing by ſmall ſums of 6d. 12d. 2d. &c. out of ſeveral lands; and theſe are within the charge of receivers and auditors, and in reſpect of their ſmallneſs, diſtance, and uncertainty of the things charged, being rents in groſs, and rarely parcel of any manor, not yet farm rents, only ariſe to about 6000l. per annum.

Theſe rents indeed are rather a burthen to the king than a profit—1. In reſpect of the charge of their collection—2. In reſpect of their obnoxiouſneſs to be loſt.

And they are a charge to the people many times five times the rent; for if they chance to be behind, the officer diſtraining exacts more for the diſtreſs than the rent comes unto; and many times the charge of the acquittance or bringing of the rent to the audit is more than the rent comes to. And for the vicontiels they are a charge to the ſheriff in collecting, which one time or other is caſt upon the king.

I could

I could wiſh, that theſe ſmall rents and rents of this nature were expoſed to ſale and ſold*. The king might ſell them to the owners of the lands chargeable with them at as good rates as they are worth, or I am ſure a better value than they are of being kept.

But I would not have the king's revenue impaired thereby, but the ſame to be forthwith laid out in purchaſe of demeſne lands, which may be ſet from ſeven years to ſeven years at a rack rent.

This rent will every ſeven years improve and amend, as trading commerce and people increaſe; whereas quit-rents ſtand at a ſtay, whatever improvement fall upon land. And hence it is, that thoſe quit-rents, which poſſibly at the firſt reformation bore a third or fourth part of the value of the lands out of which they were reſerved, are not now the fortieth nor the hundredth part thereof. Beſides, this could not be loſt, as the quit-rents are, and is a more honourable and profitable revenue by much.

II. I could wiſh ſome of the king's parks, foreſts and chaces were improved. But then I think, that none of the king's demeſnes, nor any of his lands that are not parcel of manors, ſhould not be lett out at ſmall rents, and for lives or long terms of years; but that either they be let at rack rents, or at leaſt for ſuch fines as would conſiſt with a reſervation of the full moiety of the value by the year, and for terms not exceeding twelve years at moſt. For moſt plainly the fines that are taken in theſe caſes ſhrink to nothing, paſſing through ſo many hands before it comes into the exchequer; and the king's yearly revenue of his lands is thereby reduced to very little. Whereas the ancient demeſnes and the new acqueſts of the crown, if thus improved, would ariſe to a ſtable, fixed, great, and honourable revenue, and would not be ſubject to that loſs and flux that his other revenue is.

III. Touching lands left by the ſea, we find very many and very troubleſome ſuits; the ſubject vexed; that projectors make advantage, and the king bears the undeſerved odium of it, and in concluſion gains nothing elſe by it. And yet it is poſſible, that vaſt improvements may be gotten from the ſea in ſucceſs of time, which yet may be encroached by the adjacent owners. I think it may be a juſt and profitable law, that thoſe that have been in poſſeſſion of ſhoars and relicted lands for forty

* Lord Hale makes a like propoſal in the printed treatiſe by him on Sheriffs Accompts. See p. 108.—The propoſal has been executed in part, 1. under the acts which were paſſed in the reign of Charles 2. to facilitate the ſale of fee-farm and other rents of the crown, ſuch as lord Hale refers to; and 2. under an act of the preſent reign relative to fee-farm and other rents within the ſurvey of the duchy of Lancaſter. See 22. Cha. 2. c. 6. 22. and 23. Cha. 2. c. 24. and 19. Geo. 3. c. 45.—EDITOR.

years

years last past, should quietly enjoy them without question; and that there should be set up posts and marks round about the kingdom for the discrimination of what is now held from what shall be afterwards acquired, to the end that what lies without the extent of those bounds may unquestionably be the king's, excepting only such salt rivers, where the subject hath by grant or prescription the river, itself and consequently the *fluvialia incrementa*.

IV. I think these multitudes of officers, that are employed in the collecting and receiving the king's revenue, must be retrenched. The truth is, their multitude is a burthen both to the king and people; for the fashion hath always unhappily been, that, tho' new officers are made, yet the old are retained, and so the revenue shrinks while the officers swell.

I do not know, but that the whole inland revenue of the crown might be answered with one half and less of the officers that are employed in it; and a great part of it might be answered, as the monthly assessments were, which brought in their money roundly, and without the great charge and expence and uncertainty which we find in the ordinary way that is used. And yet upon *supers* retained upon accounts the same process might issue as now.

But to descend yet to more particulars.

(1.) I see not to what use the treasurer's remembrancer is, nor those several officers that are dependent upon it. The business of that office may with equal ease and greater convenience and certainty be dispatched by the king's remembrancer and his officers; especially if those multitudes of English suits in the exchequer-chamber by English bill were abated, and a stricter hand used for the abridging of those suits to such only, as concern properly the king's revenue, the officers of the courts, and those that were really debtors, accomptants or fee farmers under some considerable fee farm; for it is now apparent, that the great business of the king's remembrancer's office are suits in the exchequer-chamber, purely concerning private persons and interests, wherein the king is little or nothing concerned; and all upon the fictitious titling of bills as debtors or accomptants, where really there is no such thing.

(2.) I see no great use of the several officers relating to the tenths and first-fruits. The whole business might be brought into the offices of the auditors of the revenue, and the king's remembrancer, who might make out process in the same manner as the remembrancer of the first-fruits doth; and the auditors of the revenue might take accounts, and the accounts might go in the ordinary track of other accounts in the exchequer.

But if that revenue should continue in that separate method as now it is, yet there be two things, that would require a ne-

cessary

ceſſary amendment, viz. 1. The receiver to be wholly taken away, as an unneceſſary officer, unleſs it be to keep the king's money for his own benefit; for the receipt may as well be managed by the remembrancer. 2. The accounts, eſpecially of the tenths, are without any controll. They may well run down into the pipe, as other accounts do.

(3.) There is a great defect in the tedious method of the ſheriffes and receivers accounts; for they keep the king's money in their hands from the time of their receipt till their accounts paſſed, which is many times a year and more after it is received. If the revenue ſhall continue in that way of management, it were fit, that theſe accomptants ſhould pay in their money as they receive it, or be charged with intereſt to the king, after the rate of ten per cent. for the ſame, from the time of their reſpective receipts.

(4.) The comptroller of the pipe was inſtituted for a good end, and might be of good uſe. But as it is now managed, it is an empty piece of formality, and of no advantage. Let it be rectified, or taken away; and the beſt rectification would be what follows, for that would ſpeedily retrench a multitude of offices.

(5.) There are at this day in the exchequer many great officers, that receive the profit and fees of their office, and either do not at all attend it, or know not what belongs to it, but only perchance once a term ſit with ſome formality in their gowns, but never put their hands to any buſineſs of their offices, nor indeed know not how. For inſtance the king's remembrancer, the receiver and remembrancer of the firſt-fruits, the uſher of the exchequer, the chief marſhall of the exchequer, the chamberlains of the exchequer, the chief clerk of the pipe, the controller of the pipe, and ſome of the auditors that I could name. Theſe, and ſome other nominal officers, are great men, enjoy their pleaſures, underſtand not or attend not to their offices, but diſpatch all by deputies; and by this means an unneceſſary charge is drawn upon the king and his people, for the chief officer hath the profit, and the deputy he hath ſome, or elſe he could not live. If theſe officers are not neceſſary, why are they continued? If they are, why ſhould they not be executed at the charge only which accrues from the deputy, and the benefit of the nominal officer that doth nothing be retrenched as a needleſs charge?

The things that would be convenient in this buſineſs, which would poſſibly remedy it, are—1. To reduce the perquiſites of theſe offices to ſuch a medium, as might be ſufficient for them that execute the buſineſs; and to pare off that ſuperfluous redundance, which ſerves only to maintain an idle grandeur, that ſits ſtill and doth nothing but take the account of their perquiſites at the

the terme's end.—2. That all persons, that are to be appointed officers in the exchequer, be personally resident upon their office, and not to perform by deputy; and no office of this kind to be granted to be exercised *per* deputation.—3. That all these offices may be granted to men educated and experienced, and not to courtiers or great men.—4. That there be no sale of offices of this nature. I do speak it knowingly. The king loseth five times more by any such office that he sells, than the profit amounts to; and it is the deareſt gratification of a courtier or servant that can be imagined, and of the greateſt detriment to to the king, when an office concerning the revenue is made the reward of that man's service that knows not how to use it. It were more profit to the king to bestow a pension to the value of the office to such a person; and when he hath done, to bestow the office freely upon an honest man that knows how to use it. It is true, I know, many offices are filled already in this kind; and reversions upon reversions granted; and an act to remedy it for the future only were to make a provision to begin the next age. It were worth a present provision, and an inspection to be made at present, and resumption by act of parliament to remedy it, with allotment of some moderate pensions to those that would be removed upon this account; and I believe the king nor people could be no losers by it.

CHAP. VII.

The present inconveniencies relating to courts of justice; and first touching the county court.

BY the true and wise constitution of this kingdom, suits, where the debt or damage amount not to 40s. were not to be determined in the courts of Westminster, unless a title of land came in question; but they were to be determined in the county court, hundred court, or court baron. And this was the ancient law. *Vid. stat. Gloceſt. 6. E. 1.** At that time 40s. was a considerable sum, 1. in respect of the intrinsecal value of the coin, for then 20d. made an ounce of silver, and at this day it is 5s. viz. sixty pence, and upon that single account forty shillings then, ariseth now to six pounds. But 2. that was not all; for, as I may say, money was at that time dearer than

* See chap. 8. of the statute.—EDITOR.

it

it is now, becauſe there was not ſo much. And hence it is, that the prices of all things at this day, are much dearer now than they were then; becauſe money is much more plenty now than it was then, as it will appear to any that looks into the proclamations of prices and commodities, both in the beginnings of iters and parliaments in the times of E. 1. and E. 2. *Vide Rot. Parl.* 8. *E.* 2. *n.* 29. *in ſchedulâ*, a proclamation for the price of victuals, viz. a fat ox fatted with corn, 24*s.*—a fat cow, 12*s.*—a fat hog, 40*d.*—a fat mutton unſhorn, 20*d.*—a fat mutton ſhorn, 14*d.*—a fat hen, 1*d.*—24 eggs, 1*d.* which evidences a great advance of the price of things at this day, beſides the advance of the extrinſecal denomination of money.

By this, that hath been ſaid, it is apparent, 1. That it was the wiſe conſtitution of the common law, to keep ſmall ſuites from the great courts at Weſtminſter. 2. That if an equal proportion in the denomination of ſmall ſuites were held, that if 40*s.* were the loweſt meaſure of the ſuites to be commenced in theſe great courts, at leaſt ten pounds would be the loweſt meaſure at this day.

And yet it is very apparent to any man that converſeth with buſineſs, that, divide the ſuits that come down to the aſſizes to be tryed at the great courts, near one half thereof are under 40*s.* at leaſt in ſome counties, beſides thoſe many, that are ended upon proceſs ſerving and before they come to tryall.

And yet there is not one of thoſe ſuites brought to triall, but at this day ſtands each of the parties in at leaſt 10*l.* but if it paſs for either, there is an allowance that recovers four times as much coſt, as the principal amounts to, viz. at leaſt eight pounds.

And by this means, 1ſt. Suites are multiplied. 2. Expences and charges are multiplied. 3. Attornies and ſolicitors multiplied.

There have been ſeveral attempts in parliament to remedy this, viz. the ſtatute of 43. Eliz. cap. 6. 21. Jac. cap. 16. But they have proved ineffectual, partly by the mutual connivance of attorneys and practicers, to decline the benefit of theſe ſtatutes, becauſe it would abridge their employment and profit; partly by the influence of officers upon the practicers in the ſeveral courts, leſt by that means their offices ſhould decay; but principally, becauſe, as the preſent conſtitution of the county courts and hundred courts ſtands, it were a kind of extremity to put theſe ſtatutes fully into execution; for it were to drive men from the courts of Weſtminſter, for ſmall matters where they may have juſtice, unto inferior juriſdictions, where as they are at preſent conſtituted, they are like to have little or none.

The

The firſt buſineſs, therefore, would be to rectify inferior juriſdictions; and then we may with probable ſafety and advantage, abridge the courts of Weſtminſter from theſe trivial and inconſiderable ſuites, where the ordinary coſts, that are given to the party that recovers, exceed the value of what he recovers. Therefore I propound,

(1.) That the county court may be eſtabliſhed in this manner in all places. 1. That there be in every county court, a perſon learned in the lawes, a barriſter of at leaſt ſeven years ſtanding, that may be the ſteward of the county court, by grant from the king, *quamdiu ſe bene geſſerit*, with a fee of per ann. out of the perquiſites of the county. 2. That the ſteward do try the cauſes at iſſue in the court by jury of twelve men, and be the judge to give judgment therein. 3. That the perquiſites of the courts be anſwered to the king. 4. That there be alſo a ſworn clerk to make and keep the records. 5. That there be a ſelect number of attorneys, not exceeding the number of ſix in any one county, to be deputed, and upon cauſe to be removed, by the chief juſtice of the common bench for the time being; and none other to be the immediate attorneys to the court.

(2.) That, although in a proportion as hath been obſerved, 10*l.* now is leſs than 40*s.* in the time of Ed. 1. yet I ſhould not propound ſo high a meaſure for them, but they ſhould hold plea of any debt, or debt, or damage, of the value of 5*l.* where the title of freehold, or leaſe for years, comes not in queſtion.

(3.) That where the ſum in demand exceeds not that ſum, the cauſe ſhould not be removed from thence by any *recordari*, *certiorari*, *pone*, or *habeas corpus*, unleſs upon oath made, that the title of the land will come in queſtion; and if upon that ſurmiſe and oath, a plaint or ſuit be removed by either party, and it appear to be untrue upon the pleading or triall, the party removing the ſuit to pay double coſts.

(4.) That the proceſſes be only by ſummons, attachment, and diſtreſs, and the execution by *fieri facias* or *levari facias*, and not otherwiſe.

This being thus ſettled, I ſhould propound, that the courts at Weſtminſter ſhould not hold plea of any ſuit for debt or damages under 5*l.* unleſs where the title of lands is concerned; and that if upon the triall of any ſuch cauſe, or otherwiſe, it ſhall appear the debt or damages amount not to 5*l.* the plaintiff ſhould recover no more coſts than damages; and if it be found for the defendant, that then he recover double coſts.

The greateſt danger imaginable in this is, that it may give a handle to the erecting of country judicatures to the counterminning of the kingdom. And I muſt confeſs, were this to be the

effect

effect of it, I think it were the moſt pernicious thing imaginable.

But certainly this is but a vain fear, unleſs we were in ſuch giddy times, that could not be contented with an eaſe and convenience to the people, without deſtroying the law and the government of the kingdom. For was not that law the ſame in the time of E. 1. and ever ſince, as to the point of the juriſdiction touching matters under 40*s.* and hath it any time introduced that inconvenience? That which is propounded, is but to caſe the county court of what makes it unuſeful and burthenſome to the people, and to render it ſerviceable and convenient, and to diſburthen the courts of Weſtminſter of theſe ſuits, wherein the coſts to be recovered exceed the value of the thing in demand. Indeed there are ſome few alterations from the ancient conſtitution.

1. In the judge; for the truth is, I think a perſon acquainted with the law, and ſworn in the office, is fitter to be truſted, than a few ignorant, and it may be, concerned ſuitors.

2. In the triall, which I would have by the oath of twelve men; and ſo in ſome counties it is uſed; though in others, the triall of the fact is by witneſſes, and the opinion of the major part of the ſuitors; in others by wager of law. I hold the triall by jury returned, the beſt triall.

3. In the ſum, which I have eſtimated to 5*l.* which is not ſo much even in intrinſical value as 40*s.* in the time of E. 1. And upon the ſame account, the freehold of jurors hath been raiſed. Firſt in the time of E. 1. it was 20*s.* then by 2. H. 5. it was 40*s.* in ſome caſes; then by 27. Eliz. it was raiſed to 4*l.* and ſince to 20*l.*

If men indeed will be giddy and unſteady, and if we ſhould ſuppoſe parliaments not to be wiſely ſenſible of their own, and the public concern, men may ſuppoſe that 5*l.* may in time ariſe to be 50*l.* and ſo the courts of Weſtminſter be deſtroyed. He that ſuppoſeth this, may ſuppoſe things yet more dreadful. But, in my underſtanding, if things were reduced to this ſtate with the county court, 1. It would be a great caſe to the people. 2. It would diſburthen Weſtminſter-hall of many ſuits, which are indeed a reproach to the honour and dignity of it. 3. It would prevent multitudes of oppreſſive ſuites; many men ſuing for trifles, becauſe, if they recover, the coſts will cruſh and undo the defendant, being oftentimes forty times more than the principall. 4. It would accommodate the county court, to be admirably auxiliary and ſubſervient to the great courts at Weſtminſter. Writs of enquiry of damages, might be there executed by the ſheriff, and in the preſence, and with the aſſiſtance of the ſteward, and not by a jury packed by the under-ſheriff in a corner. Here outlawries might be proclaimed, tables of them ſet up,

up, and tables of fines, and infinite more accommodations; becauſe it would be a place of note and reſort, and things would be managed with order, and much more notoriety, than it is poſſible they can be now as the county court is conſtituted.

That which ſeems to be the greateſt objection againſt this is, that it will multiply ſuites, the juriſdiction being cheap and at hand.

I anſwer, that it is regularly true, that this doth multiply ſuites, but yet theſe allayes with it.

1. If it were admitted, yet in reſpect of the ſum propounded, it is apparently neceſſary, that ſome remedy ſhould be provided for ſuch ſums: and it is apparently unreaſonable, that they ſhould be driven to ſue at Weſtminſter; for if the ſuit be neceſſary, he ſhall loſe by his ſuite, though he recover, in reſpect of the expence he ſhall be put to.

2. Poſſibly at this day, many trifling and cauſeleſs ſuites are commenced at Weſtminſter, to undo a defendant, with the coſts in caſe of a recovery, or to put him to great expence; which would not be if the ſuits of this nature were in the county court thus qualified, where the defence would be as cheap for the defendant, as the ſuit is for the plaintiff; and the coſts of recovery would not probably exceed the damage, but be probably leſs, which would be no great encouragement to vexation.

3. I ſuppoſe, that, in the progreſs of this diſcourſe, ſomething will be propoſed evidently neceſſary to diſcourage vexatious ſuites, as well in this as in all other juriſdictions.

4. But if the judge of the court be ſuch, as he ought to be for his learning and integrity, and the practicers ſober and credible men, vexatious ſuites will not receive much countenance.

I ſhall conclude this buſineſs with this farther obſervation, that by this means the ſtudents and profeſſors of the law, which are now generally driven or drawn up to London, ſo that there are ſcarce any left in the country, will have ſome encouragement to reſide in the country, and the country not left to the management of attornies and ſolicitors.

CAP.

CAP. VIII.

Concerning the court of common pleas, and the inconveniences that may be rectified therein.

THE court of common pleas is the great orb, wherein the greater buſineſs between party and party doth or ſhould move. The things which ſeem to me fit to be rectified, are theſe:

(1.) In their multitude of officers, it is certain there is ſome redundance therein. But I ſhall apply myſelf to one particular only, viz. they have three diſtinct prothonotaries, having three diſtinct offices, and dependent upon each officer diſtinct clerks, diſtinct attornies; which, as the caſe ſtands, muſt needs diſtract and ruin the court; for by this means one catcheth and ſcambleth from another; a declaration entered in one office, a plea in another; in caſes of differences referred to them by the court, one pronounceth for a practicer in his office, another for a practicer in his, which breeds uncertainty and perplexity in buſineſs.

The beſt remedy for this would be to reduce them all to one office, under one officer, who may ſubſtitute under him ſuch as may be ſufficient and fit for the diſpatch of the whole buſineſs; and the advantage of this would be great for the order and diſpatch of buſineſs. And we need not go far for an evident example. The whole buſineſs of the king's bench is much better diſpatched under their one ſecondary (I mean civil caſes) than by all the three prothonotaries. But if the condition of things will not bear one officer, yet let it be reduced into one office, and that office be kept in one place, the three prothonotaries equally to divide their fees, and the clerks and attornies to be all clerks and attornies the ſame office. This would avoid partiality and confuſion in the buſineſs of that court; and without the reduction of all theſe into one office, that court can never be well managed.

(2.) In their multitude of attorneys. This ariſeth principally from theſe cauſes. 1. The ſcambling and ſcuffling between the prothonotaries, every one ſtriving to get as many as he can to bring griſt to his mill. This would be remedied in ſome meaſure by the former expedient. 2. The ſcambling between the officers and practicers of the two courts of king's bench and common pleas; they multiplying clerks and attorneys at large, that may catch the buſineſs of the country, and bring it thither; and theſe, to make amends, multiplying their attorneys as faſt, and admitting any buſy, buſtling fellow to be an attorney, that hath but the ſkill to know to what office to ſend for a proceſs.

And

And this breeds theſe intollerable inconveniences. 1. Their multitude is ſo great, that they are not able to live one by another; and upon this account they ſtirr up ſuits, and ſhare upon the few clients they have, and are apt to uſe tricks and knavery to gain themſelves credit with thoſe that employ them. 2. They have ſo few clients divided amongſt them, that they are not able to attend their buſineſs; their employment will not maintain them through the term; but either they commit the care of it to others, or come up a day or two before the end of the term, and the buſineſs they have poſſibly miſcarries before they come up, beyond a poſſibility of retrievance, or not without great charge and loſs to their clients. 3. The court is hereby wonderfully entangled. They know not of whom to learn the ſtate of the buſineſs that is moved before them; and if they underſtand who is the attorney, yet they cannot ſee him, nor ſpeak with him; and by this means one motion followes the heels of another, and the greateſt buſineſs of the court is to ſet right miſtakes, to puniſh deceits, to examine miſcarriages in proceedings; and there is no ſteadineſs in the courſe of practice or proceedings.

The remedy for this would be for the court to reform the multitude of attorneys, and to abridge their number to a convenient proportion for every county; and this may be done without any act of parliament, and without any great difficulty and clamour. For, 1. There be abundance of theſe ſcarce fit for this employment in reſpect of their honeſty. And 2. many more in reference to their ability. A ſtrict and impartial examination in this kind would caſt off abundance of rubbiſh. But 3. if there were but this order put in execution, that all perſons ſhould be put out of the roll, that continue not for four terms together from the beginning of the term to the end, it would ſcale off a multitude of them; for many of them have neither cauſes nor credit to hold out a Michaelmas term.

I know the jealouſy that hath ever ſpoiled this attempt. The prothonotaries cry out, that the other courts will get the ſtart of them; they will have their clerks angling for buſineſs in the country, while theſe are attending without any at Weſtminſter.

But 1. Surely a full agreement of all the great courts would remedy this. If it were done, the court may be preſerved, and in time will grow into buſineſs as it grows into order; but this tympany of attorneys will, in a little time, deſtroy and confound it. But 2. If the diſeaſe of the multitude of attorneys be ſo ſtubborn and uncurable, yet methinks at leaſt the court might appoint four or five, or more in every county, who ſhould be, as it were, the attorneys in ordinary, through whoſe hands all the reſt might hand their buſineſs to the court, and who might give

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an account of all buſineſſes to the court, as the ſix attorneys in the office of pleas do to the court of exchequer; and the reſt may be as ſollicitors or attorneys at large. This poſſibly would cure the diſorder, as in relation to the court; becauſe they would have always a perſon at hand that ſhould give to the court and receive directions from them upon all emergencies. But I muſt confeſs the diſeaſe would be never the more remedied in the country.—The barretryes, and promoting of ſuites, would be as effectually carried on by theſe half attorneys as before. Therefore the beſt way were to reduce their number and employment.

(3.) Their defect of ſitting clerks in the prothonotaries offices, is a great deficiency; for by this means clerkſhip, which is of ſingular uſe, both to the court and client, is loſt, and a ſtock of ignorance and barbariſm nouriſhed. And beſides the advantage which accrues in this reſpect, there would by this means, at leaſt in reference to the court, ariſe a good ſupply for the prevention of that inconvenience, which otherwiſe ariſeth by the multitude of attorneys; for every attorney might employ his ſitting clerk, with whom he might correſpond, and who might from time to time give an account to the court of the concerns of every attorney for whom they are employed.

(4.) There are certain unreaſonable impertinences uſed in that court, which doth not only exceedingly prejudice the people, but gives every court at Weſtminſter the advantage of them, and ſerves for no other uſe but to ſwell the attorney's bill, and at preſent helps to fill their prothonotarie's pocket, and to reimburſe with advantage the purchaſe of his place, viz. 1. The common bar and new aſſignment, which are utterly needleſs. Yet the client payes ſix times over for it, and which the court may rectify by an order, that the place be particularly expreſſed in the declaration, as it is done in the king's bench. 2. The imparlance roll, which may be as well ſupplied by the paper book of the office, as it is in the king's bench, and ſerves for no imaginable purpoſe, but for the prothonotarie's profit, and to make errors and miſtakes. 3. The repetition of the original in the declaration, and in ſome caſes in the *venire facias*. And this is alſo paid for ſix times without any need at all. Theſe may be all rectified by order of the court, if they would but venture to diſpleaſe the prothonotaries.—And to theſe I ſhall add theſe two things, which cannot be altered but by parliament, and are preſerved only out of a needleſs ſuperſtition of what was ancient, unleſs it be to give other courts the ſtart and advantage of them. 1. Their *dies communes* and return daies ſhould be altered, and all continuances to be *de die in diem*, and not to be bound to common daies or returns

returns, neither in real nor perſonal actions; for it is of no import at all, but much retards and diſorders the buſineſs of the court. 2. Their fifteen daies between the teſte and return of their proceſs is vain and unneceſſary. It is fit, that ſuch things as theſe ſhould be left to the direction of the court, and not to have the court laced up in ſuch impertinent ſtrictneſſes in matters of ſo light a moment and uſe, but of great inconvenience, delay and incumbrance to buſineſs.

(5.) The binding up that court to the practice only of ſerjeants at law is a great diſadvantage to buſineſs. Every man is not the learnedeſt man, that gets the coife; and if it were ſo, yet it is not till a declination in ſtrength, years and nimbleneſs of underſtanding and apprehenſion. Men are not aſſumed to that degree, till they are old and rich, and able to undergo the charge. And if they were younger, yet they continue till their declining age. It might be a good expedient and encouragement to learning, if at leaſt readers were admitted to that bar, though the ſerjeant had the pre-audience. This would be a means to fill that court with the buſineſs proper for it; and it is one of the conſumptions of that court, that it is otherwiſe; for men will reſort to that councell that at leaſt they think fitteſt for their buſineſs; and if they are conſtrained to employ none but ſerjeants, here it will neceſſarily ſend the buſineſs to that court where they may have their choice of councell.

(6.) That, which is likewiſe an incident buſineſs of that court, though the ſame properly concern the chancery, may be there conſidered, viz. the payment of fines upon original writs is a great means of the decay of this court, and gives the king's bench a great advantage over it, and puts this court to very unhandſome ſhifts to hold pace with the king's bench, viz. to make uſe of that unwarrantable writ called *clauſum fregit*, to ſuit with the king's bench *latitat*. The things that I ſhould propound in order to this ſhould be,

1. That all fines upon original writs, at leaſt in perſonal and mixt actions, ſhould be taken away by act of parliament, that ſo the ſubject might have equal freedom to ſue in either court for matters proper for the juriſdiction of both courts, without being neceſſitated or invited to the king's bench, where the proceſs is cheaper.

2. That yet, becauſe theſe fines are an antient revenue of the crown, and poſſibly ſuch a revenue as is reaſonably and conveniently laid upon thoſe that ſue, and likewiſe the beſt ordinary revenue of the chancellor, maſter of the rolls, and curſitors, and therefore fit to be ſupported, though not in kind

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yet in value and equivalence; that a medium be taken of the yearly value upon theſe fines upon originals, that are propounded to be taken away, and that there be a medium alſo taken of the *latitats* and bills of Middleſex that iſſue out of the king's-bench; and that there be ſuch a proportion of fines laid upon *latitats* and writs as may in the whole countervail the uſual eſtimate of the fines upon the originals as they were uſually taken about 4. or 5. Car. 1. and that the provenue be ſettled on the crown, and diſtributed to the chancellor, maſter of the rolls, and curſitors, in ſuch proportions as fines upon originals were.

The convenience of ſuch a proviſion by act of parliament would be—1. It would prevent that intollerable ſcambling and diſorder, that happens between both courts and the officers and practicers of it, when there was an equal advantage in each court; for as I think, it is of great uſe, that the court of common-pleas be preſerved from that conſumption, which it ſuffers in a great meaſure by theſe fines; ſo I think it of great concernment, that the juriſdiction of the king's-bench in civil cauſes ſhould be upheld, as well for that it is the great nurſery of the knowledge of the law and for the breed of young practicers therein, as that it is reaſonable that the ſubject may have a juſt election to proceed in either court, in matters wherein they have a common concurrent juriſdiction, and not be neceſſitated to ſue in one, which in ſome caſes and upon ſome emergencies may be inconvenient.—2. It would preſently amend theſe new inventions, which either court have contrived to ſave themſelves, though poſſibly with ſome detriment to the people, viz. the *clauſum fregit* in the common-pleas, and the ſpecial *latitat* lately contrived in the king's-bench to preſerve their juſt juriſdiction, which had been loſt by the late act concerning bail without that expedient.

A

TREATISE

OF THE

MAISTERS of the CHAUNCERIE.

[This treatiſe is extracted from volume xiii. of Mr. Petyt's manuſcripts, in the Inner-Temple library. It doth not appear, who the author was, further than that he was himſelf a maſter in chancery, and that he was a cotemporary of the famous Mr. Lambard. The editor was referred to the treatiſe, by the notice taken of it in Mr. Barrington's valuable and pleaſing book on Antient Statutes. See Barr. Obſervat. on Ant. Stat. 4th ed. 90. The handwriting of the original manuſcript is ſo obſcure, that, at one time, the editor almoſt deſpaired of obtaining an intelligible tranſcript. As to the time of the treatiſe, it appears from the contents to have been written whilſt ſir Thomas Egerton was only lord keeper, and before he was created lord Elleſmere; which fixes the time to be, between May 1596 when that reverend judge of equity firſt received the great ſeal, and July 1603 when he was created baron of Elleſmere. If this was not ſo clear, the peculiar obſoleteneſs of the ſpelling might induce a conjecture, that the manuſcript was of much earlier date.]

A

TREATISE

OF THE

MAISTERS of the CHAUNCERIE.

FOR the better unfoldinge of this whole matter wee will hold this cours: FIRST to treate of the manner of ther creation; SECONDLY of the ſundrie appellations or names and of ther number; THORDLIE of ther dignitie and place in reſpect of ther office; FOWRTHLIE of ther duetie and ſervice in chauncery, and what manner of learninge is requiſite in them; FIFTHLIE of ther ffees allowances and rewarde.

I.

Concerninge the manner of ther creation, I finde it to have bene at ſeverall times in ſundrie ſorts; for in auntient times I finde it ſometimes granted from the kinge, as 7. *E.* 3. *Clauſ.* 2ª. *part.* to one John Langetoft, and 49. *E.* 3. *pat.* 1ª. *part. m.* 27. to one Henrie Coddingeton, and 2. *H.* 4. *pat.* 1ª. *part.* to one John Kingeton. But in Ed. the 4th his time, this ſeemeth to have growen out of uſe and remembrance; for in the argument of Bagot's aſſiſe 9. E. 4. 5. it is ſayed, that in the chauncery the clarks are of three formes, viz. the maſters of the firſt, the bourchers of the ſecond, and the curſetors of the third; and they are to be admitted by the court and ſworne; to which PIGGOT anſwers, "I "grant that the maſters and bourchers, &c. ought to bee admit-"ted and ſworne; but Baggot hath his office by letters pa-"tent, in which caſe by force of his letter patents hee is an "officer immediately, which *Laken et tota curia conceſſit.*" And in this ſort hath it ever ſithence continued, ſavinge that whereas in former times there was noe entry made of the perſons

ſons admitted and times of ther admittance to ther places by the chaunceller, it is ordayned by ſir Thomas Egerton, lord keeper of the great ſeale, that there ſhall be a record made thereof on the cloſe rolles by thoſe of the pettie bag: the which, although peradventure in owld time it were not heald neceſſarie, when the maiſters heald ther places in the hoſtel of the chauncery, and were ſufficientlie knowen by thoſe liveries which they wore of the king's guift and of the chaunceller's delivery; yeat at this day certainelie it is moſt neceſſary, when both the former matters are growen out of uſe, and I wonder whowe it hath beene ſoe longe omitted by his lordſhip's prediceaſſers. Nowe in the verie forme of the creation, namelie in the putting on of a cap, there is a repreſentation of antiquitie and maſterſhip, not unlike the uſuaige amongeſt the Romaines, when men were made citizens of Rome. And as amongeſt them a cap was the badge or token of the freedome of that citie; ſoe in former times thoſe were admitted into the number of the maſters, that had bene brought up and inſtructed in the court from ther youth, and that by the adviſement and conſent of the king's counſaile in chauncery. 7. *E.* 3. *Cl.* 2. *part. et* 9. *E.* 4. 5.

It is now beſt to remember, that the doctors in the univerſities doe uſe this manner in their creation; and maſter is as much as doctor in our univerſities.

II.

Concerninge the names and appellations, I finde of thoſe that are common to all (over and beſides ſome particular ſubdiviſions) to the number of nine, viz. *magiſtri cancellariæ, concilium regis in concellariâ, ſocii, collaterales, clerici de primâ formâ, clerici primi gradûs, clerici de majore gradû, clerici magni, clerici ad robas*; and all thoſe warranted by record and good authoritie. They are alſoe ſtiled *judices* in a certaine treatiſe that runneth in many chauncerie mens hands, the title whereof is, *De Magno Cancellario Angliæ et ejuſdem Cojudicibus et eorundem authoritate.* But albeit the auther of the ſayed Treatiſe hath compiled there togeather many things worth the notinge and obſervinge, yet in this matter of *cojudices* I take it he was deceived; firſt, for that I cannot finde it in any record; and next, it ſtands not with ſound reaſon, for if they were *cojudices*, then they cannot bee *conſilium*, ſeeinge the one denotes an equalitie of power, the other an aſſiſtance onelie. Now the auntient kings of this realme ſeeme to have diſpoſed of the court of chauncerie in ſuch ſort, as that the chaunceler ſhould bee the magiſtrate thereof, and the twelve clarks of the firſt forme ſhould aſſiſt him as his counſell. *Concilium is* defyned *conſeſſus eorum qui in cauſâ vel publicâ vel privatâ*

vatâ cum prætore aut judice cognoſcunt. They are therefore called *adſeſſores*; for of *adſeſſor*, it is ſayed, *unus cujuſque judicis portis videtur, quâ ex re comites dicuntur et participes comites; ſcilicet ſedendi particeps conſiliarii.* And it ſeemeth, that there is more ſkill and knowledge expected at ther hands, then at the hands of the magiſtrate himſelf. Further it is ſayed, *officium aſſeſſoris his fere cauſis conſtat, in cognitionibus, poſtulationibus, libellis, edictis, decretis, epiſtolis.* Accordingelie in our chancery, you ſhall never find the lord chaunceller's name ſubſcribed to any writt or pattent; yet notwithſtandinge the whole power and commandement reſteth in the magiſtrate or chaunceller onelie. And that which appertaigneth properlie to the aſſeſſor is, *auctoritas*, not *imperium*; and out of the 60 *Novella* it appereth plaienlie, that *aſſeſſores non ſunt judices.* And therefore I take the maſters of the chauncery not to bee rightlie tearmed *cojudices.*

Prateius in verb. concilium.

Curiar. in Cod. lib. 1. tit. 5.

L. 2. Dig. de officio aſſeſſoris.

L. 2. D. de officio aſſeſſoris.

Gothofred. commen. in Cod. de officio aſſeſſ. l. 2.

Touchinge the other names; to proceed with them in order:

Magiſtri Cancellariæ they are called 51. Ed. 3. and 9. E. 4. the reaſon of which name I gather owt of Caſſidorus, whoe ſayeth, *reverendum honorem ſumit, quiſquis magiſtri nomen acceperit; quia hoc vocabulum ſemper venit de peritiâ;* and out of Fleta, whoe ſayeth, that they ought to have *notitiam plenorem in legibus et conſuetudinibus Anglicanis;* and that the curſetors and other inferior clarkes ſhould write *ſub advocatione clericorum ſuperiorum qui eorum facta in eorum receperint pericula.* Soe as it ſeemeth, that the other clarkes of the chauncerie were under the maſters, as ſchollers were under ther teachers.

In Comput. Hanaper. Rot. in ſcaccario. Variorum, lib. 6. fo. 96.

L. 2. c. 13.

Ibid. circum finem.

Concilium regis in cancellariâ they are called 1 Ric. 2. where it appeareth they granted a protection to one Nicholas Clarke; and 9 Ric. 2. where Bertran de Bullingebrooke is ſummoned to bee *coram nobiſc. et conſilio noſtro in cancellariâ noſtrâ.* And in like ſort Walt. Oſborne was to bee attached by the ſhrieſe of Lancaſter, *ita quòd eum habeas coram nobis et conſilio noſtro in cancellariâ noſtrâ*; and 3. E. 2. where it is ſayed this writt was made by the common counſell of the chauncery accordinge to the ſtattut of Weſtminſter, *ne conquerentes recedant à cancellariâ ſine remedio*; and in ther oathe ther are thes formall words, *loyallment counſellers le roy quand ſeront requiſe.*

Rot. Communia Pas. prim.

Theolal. Brev. Reg. Ibid.

Abridg. Fitz. pl. 6.

Ed. 3.

Socii and *collaterales* they are tearmed by Fleta. *Collaterales*, as it ſhould ſeeme, becauſe they ſate by his ſide at a certaine table in Weſtminſter Hall and in other places; as is alſoe proved by this record, *pro panno empto ad coperiendam tabulam marmoream ante cancellarium et magiſtros cancellariæ regis ibi ſedentes et in aliis locis ubi dictus cancellarius ſigillare contigerit pro honeſtate ſigilli regis.* But *ſocii* they are called improperlie; for, as one ſayeth well, *ſocietatis*

Clericorum cancellar. lib. 2. c. 13.

51. E. 3. in Comput. Hanap.

tatis fortunarum et periculi communionem importat inter pares; comitum verò appellatio propriè ad eos pertinet, qui alium prosequuntur. Soe Ceasar useth these words, *causâ victoriæ Pompeii comitem esse mallet quàm socium.* Ceasar is speakinge of Labienus. As likewise *sodules* are sayed to bee *qui ejusdem collegii sunt*, as the masters of the chauncerie maie be called in regard of themselves one towards another. But in regard of the lord chaunceller, they may most properlie be tearmed *comites*, which worde is sometimes taken equivalent with *assessores*. Cicero *in epist. ad Quintum fratrem* writes, *quos tibi comites et adjutores negotiorum publicorum dedit ipsa republica**. In all the auntient accompts of the hanaper they are also called *commensales cancellarii* in this sort, *pro expensis cancellarii et clericorum suorum commensaliùm* 500l. Of which name Fleta (this would be placed last not as name, but by the way) giveth the reason in thes words after the Lattin of that time, *pro victu et vestitu honestè debent inveniri de proficuis sigilli in cujuscunque usus pervenerit.* And accordingelie it is sayed, 1. H. 6. *pro Simone Gainsted custode sigilli pro se ac sociis suis et aliis ministris cancellariæ secum commensalibus ut moris est, &c. deallocat. custodi hanaperii* of his expences.

D. 47. tit. 22. l. 4.

L. 2. c. 13.

Clauf. in dorf.

Clerici de primâ formâ they are named 9. E. 4. 6. and in the patent of John Kingeton, 2 H. 4. and likewise in Grenehurst's pattent, 12. H. 4. and in many other places; as *Henricus Haydook*, is called *unus duodecem clericorum de primâ formâ*, 27. *E.* 3. The which phrase of *prima secunda & tertia forma* is not newelie devised by our English Latinists, but often used in both the codes of Justinian and Theodosius, *Cod. lib.* 12. *tit.* 24. *l.* 7. *et tit.* 26. *l.* 1. 2. *de Cod. Theod. de Castrensianis.* Yet the reason of this name appeareth not, neither in the text itselfe, nor yet in the comenters that write thereupon; tho' most comonlie in such matters they seeme verie curious; I meane Cujacius and Pancirolus. *Credendum est*, sayeth Pancirolus, *primæ formæ viros sequentibus plures annonas habuisse;* and that is all that is sayed thereof. But for understanding of the word *annonæ* it is to be noted, that allowances of diett, which the emperors made to ther officers, either *militares* or *civiles*, were called *annonæ*; as the allowances for horses and other beasts were called *capita*, that is *pabula jumentorum.*

Cujac. Paratit. lib. 1. Cod. tit. 52.

Clauf. in dorso.

Clerici primi gradûs they are called 35. E. 3. and 43. in a writt directed *Radulfo Ravensoe custodi hanaperii*, to allowe *dilectis clericis nostris primi gradûs cancellariæ nostræ* 10l. *pro expensis bargæ suæ*, &c. Both of this allowance and of the word *gradus*, wee shall have occasion to speake hereafter.

49. E. 3. pat. par. 1. 7. E. 3. Clauf. 2. pac.

Clerici de majore gradu they are called in Codington's pattent, as likewise in Langetoft's pattent *magni clerici. Nostri clerici ad robas* they are called 24. E. 3. 13. in the yere-books, where it is sayed,

* *Cic. Ep. ad Quint. fratr. lib. prim. ep. prim.* —EDITOR.

ſayed, that the king called unto him his chaunceller, treaſurer, his juſtices and his clarkes of robes in chauncery, to know ther opinions concerninge a ſuſpitious deede of releas. The reaſon of which name grewe from this, that they wore robes or gownes of the King's guift by the chaunceller's delivery, as appeareth 21. E. 3. *Clauſ. pa.* 1. in a writ directed to Richard Thoreſby, keeper of the hanaper, to allow the biſhop of Worceſter, then chaunceller, 4 l. and 20 d. that he had layed owt above the King's allowance upon the robes by him delivered to the clarkes of the chauncery, for that ſervice, *propter cariſtam panni et ſendalli.*

And to have ſayed thuſſe much of the generall names may ſuffiſe, except wee ſhall note, that the king ever calleth them *clericos noſtros*, and ſometimes with a double *noſter*, as *clericos noſtros cancellariæ noſtræ.* And they were called *clerici*, becauſe they were auntientlie all of them cleorrgie men, and the word *clericus* is taken for him *qui dominico cultui in miniſterio religionis impendit*, and ſoe called *à Græco* κλῆρος; *ſolebant enim per ſortem eligi.*

Touchinge ther number, it appeareth planenlie in Henrie Coddington's pattent, that from all antiquitie it hath bene twelve; for there it is ſayed, *conceſſimus, quòd ſit unus de duodecim magiſtrorum cancellariæ noſtræ in ſupplementum dicti numeri magiſtrorum, unde unus deficit*, &c. which number concerninge the ordinarie maſters ſtille remayneth; the maſter of the rolles beinge alwaies the firſt, whoe therefore is ſometimes ſtiled *unus cancellariorum Angliæ*, and the pronotorie another; and the reſt in auntient time were diſtributed into commaunders and examiners. There have bene of late time many more maſters admitted, and tearmed by the name of extraordinary maſters; and it ſeemeth ſoe they bee, for it maye bee very diſputable, howe they are warranted to execute, &c. Yet ſeinge by an order of my lord chaunceller Hatton, which is alſoe confirmed and enlarged by my lord keeper Egerton, they are limited to certain confines, I finde noe great cauſe, that the ordinarie maiſters have to complaien of any prejudice donne to them as beinge as the ſayed orders are obſerved, whereby they are to remember, that they are called *in partem ſollicitudinis*, and not *in plenitudinem poteſtatis.* In this number may bee obſerved, the proportion to thoſe that ſit one the other benches at Weſtminſter, whoe 20. E. 3. are ſeit downe ſpetiallie by name, and even the ruffle of ther robes particularle deſcribed alſoe; and then were there ſix juſtices of the common place, four of the king's bench, and four barons of the exchequer. Soe as it ſeemeth, that at the firſt inſtitution it was thought neceſſary to have almoſt as great a number to direct the compoſinge and awardinge of originalls, as of thoſe that were to diſcuſſe and determine matters brought before them by

49. E. 3. Pat. 1. par.

Fra. 6. H. 8.

Crook's auntient orders of the chauncery.

Clauſ. 1. part. in dorſo.

There can be no obſervation hereby of ther places.

They were more and fewer at the pleaſure of the kinge.

There were nine judges of the common lawe 14. E. 3.

by originalls into judgement; except perchance ther number was soe great, for that they were to assist the lord chaunceler for more then common lawe causes, as civile, canon, &c.

III.

Touchinge ther place and dignitie in respect of other officers, the same hath of late yeres bene verry much and disproportionablie abated, and cheiflie upon this occasion. Doctor Barkley, a master of the chauncery, in the 18th of the quene, sittinge in the parliament howse, as the manner is, upon occasion of speeche amongst the lords of certaine officers to have certaine priviledges, withowt askinge leave got up, and entred into a speech of desiringe, that the masters of the chauncery might also bee comprised in the sayed priviledge then one foote; which request came soe unseasonably, and was so inconsideratelie propounded by the said doctor, as the lords in generall tooke offence thereat; and amongest the rest some of great authoritie sayed, that whilest the quene's learned counsell were silent, it were great presumption in him, beinge one inferior to them, to bee soe busie. Soe as upon this the next day, the serjant, atturnie, and sollicitor, tooke place above the masters of the chauncery there, which before time had never bene donne; and ever sithence, not onelie they, but serjants at the lawe also, doe it generallie at all publique meetings, upon this reason, that they tooke place before the attornie and sollicitor. The which point, as against the attorney and sollicitor, which palpablie every daie raseth higher then other, it is not perchance fitt to dispute; soe as touchinge serjants at lawe, to my understanding, there are many reasons, whie they should not have precedence. But what congruitie there is, that the master of the chauncery, whoe by the function of his place sitteth one the bench covered *coram domino rege*, should out of that place comee behind the serjant of the coiffe, whoe in distinction from other of the king's serjants was called serjant counter, and by the function of his place standeth likewise uncovered, not onelie in the court of chauncery before the lord chaunceler, but in other places also when they come to debate matters for ther clients before the master; let thes judge. And though Brooke in his Abridgment noteth upon a cas, that speaketh of knighthood to bee a name of dignitie, 14. H. 6. 15. that the place of a serjant at the lawe is also a dignitie, becaus his

West. 1. c. 29.

Brooke *Name de Dignitie*, 13.

his writt runneth *ad ſtatum et gradum ſervientis ad legem, &c.* that cannot make him over-reach the maſter of the chauncerie, whoſe place is alſoe tearmed *ſtatus et gradus*, both in Knighton's and Grenehurſte's pattents, and ther pattents were under the whole ſeale, whereas the ſerjant hath his *ſtatus et gradus* by a pettie writt *ſub pede ſigilli*, and is to ſtand at the barr, whereas the maſter hath his *ſtatus et gradus* by a full pattent under the whole ſeale and at the bench; and therefore it is not ſimply called *gradus*, but *major gradus* in Codingeton's patent, and *primus gradus* in a writt to Ravenſter clark of the hanaper, 49. E. 3. 35. et 31. E. 3. This is in reſpect of ther degrees in the ſame court, and ſoe the compariſon holdeth, but not in reſpect of other courts, for certaine allowances to bee made to them. But for aſſigninge of them ther right place, the matter may be thuſſe conſidered of.—I take the matter to ſtand, that the name and office of chauncery was firſt brought into England owt of France, as Pollidore Virgill affirmeth, and that by William the conquerer. But as in the man hee was deceived (for there is mention in ſundrie records of one Renibaldus that was chaunceller to Edward confeſſor) ſoe have I in an other place plentifullie proved, that in the thinge itſelfe hee was not deceived, but the ſayed Edward beinge brought up in France, or ſome other, brought it firſt from thence hither. In the court of France, from whence I doe agree with Pollidore Virgill the name was brought into England, though before the time of William the conquerer, there are two ſorts of the maſters of the requeſts, the one *del hoſtel*, whoe have the ſame office that our maſters of requeſts have here in England; th' other *du palais*, whoe aſſiſt the chaunceller of France in the French chauncery, as our maſters of the chauncery aſſiſt the chaunceler of England in the Engliſh chauncery. This the Frenchmen ſeeme to have drawen from the court of Roome, as where ceremonies are moſt exactlie obſerved, and where they have a ſpetial maſter of them, and where they have alſoe two ſorts of maſters of requeſts, the one *ſignatura gratiæ*, and the other *ſignatura juſtitiæ*. The firſt ſort of regiſters conſiſting upon favor the kinge reſerveth to himſelfe. The ſecond, which requireth care and induſtrie, and is not ſoe plauſible, hee leaveth to his officer the chaunceler, under whome the maſters were wont to expedite the ſame; for proſe whereof 21. E. 3. 47. it appeareth plaienlie, that all petitiones of right ought to bee directed by ther indorcement to the chaunceler, and to none other, and to bee determined by the chaunceler, and counſel of that . And accordingelie, *Articuli ſuper cartas, c.* 6. ſaieth *ſoubes les peties ſeales deſormaies n' iſſera nul breve que touch commune ley; et* 11. R. 2. c. 10. *lettres de ſignet ou ſecret ſeale noſtre ſeignur le roy ne ſoient deſormes envoyez en damage, ne prejudice de roialme, nen diſturbance de*

2. H. 4.
12. H. 4.

It is good to ſee what places they neald at the coronation of kings. There is twice mention of them in Hall's Cronicle.

Yet ſee Mr. Lambert's collection, that Edgar and divers other Saxons had ther chauncellers.

This would ſerve better in ſome other place of the authoritie of the court of chauncery.

de la ley. I take it that ther place, as ther function is, ſhoulde be immediately next to the maſters of the requeſts, with whome they participate alſoe in name. The ſerjants at lawe, whoe ſuſtaine indede publique preſence for delivery of the king's people in ther ſuits of lawe *ex officio mercenario*, cannot in any congruite of reaſon bee placed before thoſe, whome the king ſtileth with the name of his counſeilers, and that ſerve not onlie for the deliverie of the people in ther private cauſes, but for diſpatch of ſundry the king's own buſines alſo. And hereunto add, that all acts, donne before them in any place of the realme, are ſayed to bee donne *coram dominâ reginâ;* and then in regard of her majeſtie's honor, thoſe that ſuſtaine thes places ought to bee more reſpected. And certainlie the great inconvenience of this decay of ther reputation redoundeth to the chaunceler himſelf; firſt, in that it is an indignitie to the hight of a magiſtrate to have his collatterals and aſſiſtants of ſoe meane quallitie; and next, for that all his decrees beinge arbitrary (in which cas one of the parties thinketh himſelf ever either wronged or hardlie borne) hee had neede to have ſome joyned with him of ſuch qualitie and regard, as may ſuſtaine and break ſome of that ſtreame of evill will and envy, that ordinarilie purſueth him. This my lord threaſorer Burleigh obſerved in the exchequer, whoe increaſed the dignitie of his aſſiſtants the barons, inſoemuch as the ſerjants at this day debate not the precedences with the inferior formularly baron of that court, whoe I aſſure myſelfe in former times was not equall in reputation with the maſters of the chauncery, but in the ſame analogie and prefection to them that the court of exchequer is to the court of chauncery. And ſeinge the maſter of the rolles, as the firſt maſter of the chauncerie, taketh his place (and not for his office of *cuſtos rotulorum*, which is an inferior office) betweene the too cheife juſtices, it maie be partlie eſtimated where his fellowes ought to take ther places.

IV.

But nowe I come to the great and maine point of this treatiſe reſtinge in two branches, ther ſervice and ther learninge, but ſoe incident as they can hardlie be ſevered.

Compoſing of Writts. Lib 2.c.12.

The firſt and cheife point of ther ſervice and of the ſkill requiſit thereunto, I find mentioned in Fleta, whoe ſaieth, that *eorem officium præcipuè*

præcipuè positum in conquerentium querelis et supplicationibus audiendis et examinandis, ut eis super qualitatibus injuriarum ostensarum debita remedia exhibeant per brevia regis. For ther habilitie, wherein that booke requireth four things in them, that they bee honeſt, circumſpect, *domino regi jurati*, and laſtlie *in legibus et consuetudinibus Anglicanis notitiam habentes pleniorem*; the manner of this service is particularlie expreſſed in the foreſayed place of Fleta, and generallie touched to the ſame effect in the foreſayed pattent of 18. E. 3. that namely ſome of the maſters, named commaunders, ſhould conſider of the proper writt or commiſſion fitt to trie and redreſſe every particular greife or wronge which is complayned of, and direct the curſiters and other inferior clarks to make them; and others, againe, tearmed examiners, when they are ſoe made, ſhould examine them, *in ratione, dictione, et ſillabis, et literâ*, before they be put unto thé ſeale. And heretofore, when doubts did ariſe upon writts ſent out of the chauncery, or to be formed and compoſed there, not onlie the king's juſtices were wont to ſend to conferr with the maſters concerninge the ſame; but the kinge himſelfe hath ſometimes, togeather with his chauncelor, threaſorer, and juſtices, called alſoe his *clericos ad robas*, to conſult about ſuch cauſes. And albeit the curſiters have ſoe farr emancipated themſelves by the déviſe of a certaine lord keper, whoe thereby raiſed matter of proffit, not onely to his ſucceſſors, but to his heires alſo, with wrong and prejudice to the maſters of the court, and detriment (as it hath ſithence fallen out) to her majeſtie's revenues (as it would be hard to reduice them nowe to the firſt inſtitution) yet, upon conſideration had, I think it would appeare verie convenient to have ſome other writts to bee compounded, and all generallie to bee examined after the auncient manner. For it is to be underſtood, that the writts of the chauncery are of three ſorts; ſomme of courſe, as originalls returnable in other courts; ſomme of grace, as *ſubpœna, ſupplicavit, certiorari, ne exeat regnum*, injunctions, commiſſions, and ſomme other of forme, as *diem clauſum extremum, mandamus, quæ plura, ſcire facias, elegit*, &c.—Nowe as the firſt ſort are appropriated to the curſiters, and the laſt to the maſter of the rolles and his clarks; ſoe for the middle ſort, which properlie appertaine to the maſters, and therefore by Bracton and Fleta are called *magiſtralia*, there is great reaſon to have them reſtored to the care and allowance of the maſters; for, as they paſſe nowe, every inferior clark withowt controllement prefers them to the ſeale ſtuffed for the moſt part with ſuch Latine and want of coherence and forme, as is fitt to make both the compounders and the writts themſelves ridiculous, but far different from the auntient gravitie and learninge of the court. Againe, touchinge awardinge of ſuppena, there is yet a farther reaſon, for the obtayning

Examination of writts.

2. R. 3. 2 et 4. E. 4. 41.

2. E. 3. 13.

The gaine the counſallers have by drawing thes bills more then by ſuits at common lawe, and the little ſkill requir-ed in them, hath filled the chaun-cery ſoe full of cau-ſes as I conceive.

tayning of which the complaienant preferreth a bill, which by an order (begunn as they ſaie in ſir Thomas More's time) is now ſub-ſcribed with the hand of a counſaller at lawe, and ſoe paſſeth with-owt farther examination. But it were more agreable to the aur-thoritie of Fleta and to reaſon itſelfe, if the conſideration and cenſure of the bill were alſo referred to the maſter of the chaun-cery before the ſuppena iſſued, that he might conſider, whether the matter therein contayned bee fitter to be diſmiſſed by originall, or retayned by ſuppena; for it is to bee ſuppoſed, that in thes matters the maiſters of the chauncery have more ſkill and leſs affection, then the counſallers at lawe; whoe, though they be ſkilfull, yet frame themſelves to ſatiſfie ther appetites that retaine them. And by this courſe would all the charge trouble and de-lay, that groweth by demurrers upon bills, utterlie ceaſe.—Againe, in puttinge writts unto the ſeale the care of the examiners ſeemeth fitt to be renewed, ſeinge nowe they are put thither at every pettie clark's diſcretion, bee hee never ſo ignorant and un-ſkilfull, without any overloking or examination at all; ſoe as un-doubtedlie moſt of thes writts muſt carrie with them errors, in-congruitie, writing not accordinge to the cours of chauncery, raſures and blottings; none of which by the auntient cours of the chauncery, as Fleta witneſſeth, ought to bee tollerated. Be-ſides, if all writts were brought by thoſe that write them (as by ther office they are bound to doe) to the examiners, and then were put into the pettie bag under ther ſeales, from whence they ſhould be drawen forth to great ſeale, neyther would there bee ſoe great tumult and ſtirr, nor ſoe much ſealinge of writts at ſealinge times, as nowe is uſuall.

Stat. *de fac-ca clericorum cancellariæ.*

Compoſinge of lettres and pat-tents.

And I take it, ther care both in compoſinge and examininge ſtretched ſomewhat farther then to writts; namlie to pattents and lettres to bee written for the kinge, and to examininge of records and exemplifications; and that therefore in this behalfe there was alſo too points of learninge requiſite in them more then are men-tioned in Fleta; the one, ſkill in the chauncerie courſe of writ-tinge; the other, good ſkill in the Lattine.—That they wrote or cauſed to bee written in ther names thos pattents that camme into the chauncerie by warrant of privie ſeale, and otherwiſe, is appa-rent by ſundrie auntient pattents, to which ther names are ſub-ſcribed. And although ſome chauncellers alate by uſurpation have reſted the writings of thes pattents alſo from them, and diſ-poſe it not by the adviſe of the king's counſaile in chauncery to the clarks of the court, but to the proffit of ther owne meniall ſervants; yeat by what right it is donne maie appeare by this, that the chaunceller's owne name is never ſubſcribed to any of thes pattents; and albeit the warrants be directed to him alone,

yet

yet muſt they be expedited by the officers of the court under him, for otherwiſe hee might call the ſcrivenor of London alſo thereunto. Beſides, it ſemes the awardinge of protections appertaigned unto them; ſometimes upon oathe made and ſuertie put in by the proſecutor thereof, of which ſort one by them was granted to Nicholas Clark; and ſometimes upon bills, and not writts or verry ſeldome of the privie ſeale, or of any captaine or ambaſſader that was ſent one the king's ſervice. And by reaſon that they were well ſkilled in the Lattin toungue, and uſed to compoſinge of epiſtles, it ſemeth alſo the king uſed ther paine and ſkill in writinge lettres to forraine princes, without charging himſelfe with newe ſtipends to Latine ſecreataries as nowe is uſed. And of this ſort I find many recorded one the backſide of the cloſe rolles; as one to the emperor, which beginns *Sereniſſime Princeps*, the argument thereof beinge nothinge but a congratulation of his election and other matter of compliment; and another to himſelfe likewiſe in anſwer of a former ſuite by the emperor to the king, which is cunningelie compoſed, ſhewinge in words great good will, and yet denyinge with as greate dexteritie his requeſt touching a peace with the French kinge; another to Magnus kinge of Norway, demanding reſtitution of Engliſhmens goods that were put under arreſt by his officers; another to the pope by the king and his counſaile under the great ſeale, where they give him finer words, but prohibit his Holines notwithſtandinge expreſslie yenough from medlinge with any benefices in England; and in like ſort to ſundrie others, as to Albert duke of Auſtria, to the king of Armenia, to the king of Caſtile, and to ſundrie others; all compoſed with that gravitie and congruitie of ſence, and that pureneſs and choice of words, as I dare undertake none of thos whoe have Lattine ſecreataries could amend any of them. And thuſſe muche touchinge ther compoſinge—Nowe touchinge the examination of records, pattents, and exemplifications. It is partlie uſed at this day, but yet not in dewe forme; for nowe they ſubſcribe ther names ſeverallie, whereas they ought to examine the inrollement and the exemplification jointlie togeather; for otherwiſe the inferior clark that writes it maie deceive any one, bee hee never ſoe attentive. And therefore the ſpetiall grant, that hath bene made of examining lettres pattents to one man alone, is not only injurious to the maſters, but abſurd in itſelfe; ſeinge by poſſibilitie one man alone is liable to performe it.

Fra. 1. R. 2. par. 1. c. 1.

Fra. 17 H. 8.

Cl. 9. E. 3.

Cl. 39. E. 3.

Cl. 35. E. 3.

Cl. 48. E. 3.

Cl. 15. E. 3.

Cl. 9. E. 3.

Cl. 10. E. 3.

Examination of records and pattents.

Brend executed that place; but I think it was by deputation.

I finde alſo, that the examination of witneſſes for tryall of matters dependinge in chauncerie hath bene a peice of ther charge and care, when thoſe examinations were taken owt of the court in other parts of the realme. And therefore it appeareth, that William Elliot, one of the maſters of the court in H. 7th's time, went into Devonſhire to examine witneſſes of certaine things donne

Examination of witneſſes.

Brevia regis 4. H. 7.

donne at Bourdeaux in France. The care of examininge witneſſes
Fra. 1. H. 5. was committed to Ralph Grenehurſt, pronotarie of the court, whereof hee was to make report to the court both under his ſeale and *ore tenus*. And as it ſeemeth there is great reaſon, whie this peice of ſervice might bee better performed by the maſters of the court, then by ſuch commiſſioners as are now-a-daies commonly choſen: for in wainge and conſideringe of depoſitions the civilians and canoniſts holde, that the countenance the conſtancie and aſſurednes, the waveringe and irreſolutenes, of the deponents, is ſpetiallie to be regarded; of which point the maſters, that ſhoulde bothe take the depoſitions and aſſiſt the lord chaunceller at the hearing of the cauſe might well informe him, which the commiſſioners being abſent cannot doe. Adde hereunto, that it would bee diſpatched with greatter ſkill and greatter furerietie, by the maſters havinge much exerciſe and learninge, and beinge not affectionate to the parties, then it can bee by the uſuall commiſſioners, being for the moſt part unlearned, unexſpert, apt to be circumvented by ſome craftie aſſociate of thers, and ever affectionate to one of the parties, and as I thinke with leſſe charge to the parties alſo. And thuſſe much of examinations taken owt of the court. Thoſe taken in court were heretofore donne either by the chauncelor himſelfe, or by ſome ſpetiall man to whome the chaunce-
Cl. 1. H. 5. in dorſ. ler committed it. Upon interrogatories exhibited by Coddingetoft *narratoge regis* and his ſerjant, the biſhop of Wincheſter beinge chaunceller examyned one that had brought bulles of proviſion
& 14. H. 4. from Rome. By the appointment and commandement of the chaunceller, John Rothewell was examined before John Wakeringe maſter of the rolles of what eſtate he was ſeized in certain lands.

Receiving atturnies general. Another part of the ſervice of the maſters conſiſted in receiving of atturnies generall, of whome mention is made both in the ſtattut of 18. E. 3. * and alſo in the regiſter fo. 20. the which was donne after this manner. When any of the king's ſubjects by his licens or imploiement was to goe out of the realme, or to ſome garriſon towne in the realme, it was lawefull for him to chooſe one or more of his friends, whome hee might depute in his abſence *ad lucrandum aut perdendum* in all plees *motis et movendis* in any court of England; and when he had declared ther names before one of the maſters of the chauncery, they awarded him writts *de attornato generali conſtituto*. Thoſe names, as well of the atturnies as of the partie and of the maſter that tooke them, were ſpetiallie inrolled of record, moſt commonlie in the forraine rolles, and ſometimes in the pattent rolles. And of ſuch atturnies there

* 18. E. 3. ft. 5.—Editor.

were

were yerelie made ſome thouſands in E. 3.'s time and R. 2.'s time, and the kings that preceded and ſucceeded them next, as by the rolles of thoſe times manifeſtlie appeareth. Thoſe, who went one the king's ſervice eyther in warr or ambaſſinge, were at ther choice, either to make ſuch atturnies, or to have protections under the great ſeale upon certificate from the privie ſeale, (which then ſerved for teſtifyinge and commandinge matters reſolved by the privie counſaile) or from the ambaſſader or captaine under whoſe conduct they went. And ſomme had both protections and made ther atturnie alſoe; as William Sterme being to goe one embaſſinge into Ruſſia. And if this cours were renewed againe, it were more commodious for the parties and more warrantable in lawe, then thes which are now uſed. Fra. 8. H. 4.

Manucaptions in chauncerie are even at this day a piece of ther ſervice alſoe, but not in ſoe many caſes as auntientlie they were wount to be taken. For it is now in a manner reſtrayned to writts of *audita querela* and of *ſuperſedeas* for the good behaviour. But in former times the chiefe part of this ſervice reſted upon *ſuperſedeas* to writt of *capias* and exigent awarded out of the common place or king's-bench; for if the parties ſuerties for him camme into the chauncery and put in ſufficient caution to appeare at the day prefixed in the writt iſſuing owt of either of the benches, then had hee out of the chauncerie a *ſuperſedeas* to the ſhreife not to moleſt him in the meane time. And thes writts were auntientlie ſoe well obaied, as Finchden that learned juſtice ſpeakinge of ſuch ſuertie in chauncery, where in the common place they uſed to take none in that cas then in queſtion, but to have committed the partie to priſon, ſaieth, *coment que ceux del chauncery ont fait error, n'attient pas à nous pour impugner lour maundement que eſt garrant à nous.* And this healpe and releife was not onelie yealded to the ſubjects in civill cauſes, but in criminal alſo, where men were impriſoned upon ſuſpition of felonie and murther, as appeareth both in the Regiſter and the newe *Natura Brevium.* But farr greatter things in this behalfe are to be found amongeſt the records of the Tower. For John Britt, putting in fower ſuerties in chauncery, whoe undertooke for him boddie for boddie, that hee ſhould appeare before the king's counſaile or his juſtices at a certaine day, and in the meane time be of good behaviour, was delivered owt of the Tower of London. Soe were certaine others, committed thither for miſdemeanors againſt Elerton a ſerjant at armes upon his report againſt them. Soe was Radclife delivered alſoe, beinge committ thither *ob ſeditiones motas in regno.* Soe was Metham and his ſervants delivered thence, upon ſuerties for ther good behaviour, and ther owne corporall othes taken in that behalfe. Further, owt of the Fleete was Henrie Blifeley delivered, putting in ſuerties in chauncerie

Manucaptions and recognifance.

18 H. 6.

18. Dier 4. Eliz. fo. 212. Nov. Natura Brevium, fo. 236.

Fol. 269, et alib. Fo. 249.

Cl. 11. E. 3. pa. 1.

Cl. 28. E. 3.

Cl. 36. E. 3.

Cl. 11. R. 2.

to retorne thither at a certaine day. The words of the record
Cl. 18. E.3. 2. pa. are, *invenit manucaptores, ut causâ recreationis inde ad certum tempus exiret.* Soe was a collector, being committed by the barons of the exchequer, findinge suerties in chauncerie to appeare before
Cl. 21. E.3. 2. pa. the sayed barons at a certaine day to him prefixed. Soe was John Piet, beinge committed thither for mony by him due to the kinge, whoe first obteyned a writt out of chauncery directed to the *thesaurier* and barons, *ut ipsum mandarent ad largum*; and after that
Cl. 24. E. 3. pa. the 21st of March in the vacation time upon suertie putt into the chauncerie hee had a writt to the warden of the Fleete to suffer him to goe at libertie; and both thes writts were made by warrant from the counsaile, but *ore tenus* as it seemeth. Likewise
Cl. 28. E.3. Thomas Aston, beinge alsoe committed thither for debt to the kinge, upon suerties put into the chauncerie the 20th of March to appeare before the barons *quindena paschæ* was sett at libertie by
Cl. 9. R. 2. direction to the warden of the Fleete. Moreover, by such suerties put into the chauncerie to appeare at a day prefixed sundrie committed to the Marshalsea have likewise been sett at libertie.
Cl. 11. E.3. pa. 1. So have others *capti pro venatione in forestâ* bene put into *ballium usque adventum justiciariorum itinerantium per manucaptionem in*
Cl. 13. H.4. *cancellariâ*; and the writts thereupon awarded were directed *custo-*
Cl. 4. H. 5. *dibus forestæ.* Furthermore, souldiers, retayned by the king to goe into his armie beyond sea, have had leave to repaire to ther homes *donec dies profectionis advenerit per manucaptionem in can-*
Cl. 36. E.3. *cellariâ.* The like hath bene donne for ships taken for the king's service, as for example, upon manucaption in chauncery, that the ship of John Chamber *se non diverteret, &c.* a writt went out directed to Dantry and Applebi serjants at arms to sett the same free, they havinge before arrested the same *pro passagio regis.* And many things, nowe dispatched in the admiraltie, were in owld time in a more due cours donne in the chauncerie; as for example, *de bonis et marchandisis quorundam mercatorum de Hanse Aleman-*
Cl. 25. E.3. *norum per manucaptores in cancellariâ liberandis.* And this veiry often in like sort manucaption was put in chauncerie *de bonis captis pro reprisalibus restituendis* assoone as the English marchants
Cl. 17. E.3. pa. 2. had bene satisfyed thereout. Againe, certaine marchants and masters of ships *recognoverunt in cancellariâ de prestando inde*
Cl. 6. H. 5. *dominum regem et populum versus Burgandos quoad literas reprisalie* which had been graunted them. Besides, there were almost noe salfe conductes graunted for the ships of marchants strangers, except English marchants were bound for them upon certaine conditions, (which, as I think, would be found very necessarie to bee put in use at this daye, if they were seene
Fra. 20. 10. 5. et 4. H. 6. and considered of) as is every where to be seene in the forraine rolles in the time of H. 6. As in like manner upon every licens granted

granted of transporting wolle wheate, &c. there were firſt ſuerties put into the chauncerie for the well uſinge of the ſaid licens. And laſtlie, thoſe, that had day given them to appeare in the ſtar-chamber, put in ther ſuerties for the ſame in chauncery. But here it is to be noted, that the maſters of the chauncery did not diſpatch all thes things by ther owne authoritie; but in many of them ther miniſterie was onlie uſed, and the aurthoritie camme from the privie counſaile; as in ſetting free priſoners owt of the Tower or owt of the Fleete beinge commanded thither for debt to the kinge, and in diſcharging ſhips from ther arreſts, and ſuch other things which rather concearne the kinge's owen affairs then the common lawe. But when ſuerties or manucaptions were to be taken of what ſort ſoever, they heald it more convenient in owld time (and the ſame reaſon continueth ſtill) to committ the diſpatch of them to the maſters of the chauncery, whoe were ſkillfull and expert in takinge and drawinge recogniſances and of the circumſtances pertayninge to the ſame, and where the ſayed recogniſances were affoone as they were entred into ſafelie kept *ab initio* amongeſt the king's records, then as it is nowe uſed to truſt to all kinde of clarkes and in all places, whereby it cometh to paſſe, that many of them are abſurdlie compoſed and not good in lawe, and ſuch as they are many of them alſo ſcattered and loſt before they come to bee kept amongeſt the king's records. Fra. 10. et 36. H. 6. Cl. 8. R. 2 dors.

Another part of the ſervice was to aſſiſt the chauncellor alwaies at ſealinge times; and in his abſence or ſicknes they had the overlokinge and direction of the ſame themſelves, as maye be evidentlie and plentifullie proved out of the records of the court. 1°. *Aprilis* was the ſeale delivered to Henry Cliſt, maſter of the rolles, to bee kept by him, and that under the ſeales of Henry de Edneſton and Thomas de Banburgh. 30 *Januarii* was the ſeale delivered by the archbiſhop of Yorke to Edneſton Bamburgh *et* Jo. St. Pawle, three maſters of the court. 6 Aprill John Archbiſhop of Canterberry, being lord chauncellor, delivered the ſeale to Robert of Stratford his brother to bee kept under the ſeales of Edneſton and St. Pawle. After the death of the biſhop of London the chauncellor, the duke of Cornwall, beinge warden of the realme, delivered the ſeale to St. Pawle then maſter of the rolles to bee kept under the ſeales of two other of the clarks *de primâ formâ*. Sir Robert Burcher, knight, chauncellor, beinge to goe to his howſe in the cuntrie delivered the ſeale to two of the clarks *de primâ formâ* to bee kept by them till his returne. Parucing lord chauncellor being ſick, two of the maſters of the court by his commandement ſate at the ſeale, and diſpatched that buſineſs. Ther names were Thorſby and Broyton. Burcher lord chaun- Attendance at ſealinge times. 51 E. 3. Comp. Han. Cl. 6. E. 3 Cl. 7. E. de 2. pa. Cl. 8. E. 3 Cl. 13. E. 3. pa. Cl. 14. E. 2. pa. Cl. 17. E. 2. pa.

l. 15. E.3. p2. cellor, beinge to goe unto the kinge, *quod nota*, at Norwich, left the ſeale with Pardiſtow one of his owne clarks to bee kept under the ſeales of two of the maſters of the court, whoe in his abſence opened the ſame divers times and ſealed therewith, ſometime *apud hoſpitium unius doctorum magiſtrorum*, and ſometimes at Weſtminſter. John biſhop of Worceſter lord chauncelor, l. 25. E.3. beinge to goe unto his biſhoprick, delivered the ſeale to Da. Woller maſter of the rolles 2 Sept. to bee kept under the ſeales of Brafton and Grimeſby, whoe reſtored the ſame unto him againe 8 October, and in the meane time *ſigillationem præferunt et hoſpitium cancellariæ tenuerunt.* The archbiſhop of York lord chauncellor, beinge to goe to his biſhoprick, delivered the ſeale to the ſayed Woller to bee kept under the ſeales of Brayton and Offord. Sir l. 27. E.3 Robert Thorp, knight, lord chauncellor, left the great ſeale l. 45. E.3. *ſub cuſtodiâ clericorum cancellarie.* Adam biſhop of St. David's lord chauncellor, going to Calleas in commiſſion of ambaiſſinge to treate with other forraine ambaſſadors there, delil. 51. E.3. vered the ſeale to William Burſtall maſter of the rolles and Ra. R. 2. venſoe and Newenham. Soe likewiſe Delapole duke of Suffolk lord chauncellor, being to goe in ambaſſinge into France, left the ſeale the 5th of Feb. with Waltham Ravenſoe and Newenham, who reſtored the ſame unto him at his returne on the 28th of March; but this was donne by direction of two writts of the privie ſeale, the one to the lord chauncellor to deliver it, and the other to the foreſayed clarks to receive it. The ſame chauncel- l. 9. R. 2. lor, beinge to goe about his private buſineſs to Kingſton upon Hull, left the ſeale with Waltham maſter of the rolles, which received it *per literam deſignatam* in the preſence of the clarks *tam primi quàm ſecundi gradûs*, and never opened the ſame but l. 16. R.2. in preſence of the ſayed clarks. 25 *Martii* the archbiſhop of Yorke, lord chauncellor, by writt of privie ſeale was commanded to deliver the great ſeale to Buxton *cuſtos rotulorum* and Ravenſoe *cuſtos hanaperii*, whoe by another writt were commanded to reſeive the ſame *ad ſigillandum id, quod eſt de communi curſu cancellariæ, et quod pertinet ad communem legem*; and after by another l. 12.H.4. like writt of the 20th of Aprill they reſtored the ſame to him againe. Laſtlie, the great ſeale was delivered to Wakeringe *cuſtos rotulorum* by Banfort lord chauncellor upon this reaſon, *quòd circa alia negotia adeo erat occupatus, ut ſigillationi vacare non poſſet.*

ttendance n parlia- ent. Another part of ther ſervice is in attendinge in the higher howſe of parliament, whither they comme withowt writt as beinge a part of the ſame court. For both the parliament is ſomoned by writts owt of the chauncerie; the acts made are inrolled and kept in chauncerie; all commandements of that court

court are expedited, either by writs out of the chauncery, or by the chauncellor's ſerjants at armes; the lord chauncellor is ever ſpeaker of that howſe, withowt further choice or appointment as is uſed about the ſpeaker of the lower howſe, and ought withowt any writt to attend there, (although the contrayrie have bene of late uſed by ſome of the pettie bag not well inſtructed of the auncient manner); for what neede hath the kinge to ſende notice under his ſeale of the attendance to thoſe whoe have the keping of of the ſayed ſeale?) and the clark of the parliament hath his fee owt of the hanaper as an officer of the chauncery. The reaſon of ther attendance there I take to bee, not onely for the receyving of petitions; but as the judges are there, that, by obſervinge the minds and reaſons of the lords that make the lawes, they maie the more agreeable to ther meaninge expound and interpreate the ſayed lawes; ſoe the maſters of the chauncery are there alſo, that they may likewiſe frame the writts that are to bee made upon thoſe lawes in like correſpondencie; and as the judges furthermore maye informe the lords, howe former lawes of this realme preſentlie ſtand touchinge any matter there debated; ſoe may they bee alſoe informed by the maſters of the chauncery (of which the greatteſt number have alwaies bene choſen men ſkillfull in the civill and canon lawes) in lawes that they ſhall make touchinge forraine matters, whowe the ſame ſhall accord with equitie, *jus gentium*, and the lawes of other nations. And therefore the auntient uſe hath bene, that not onelie the four appointed for reſevours of petitions, but any of the maſters of the chauncery, may take ther place amonge the reſt in the higher howſe, as I learn by the auntient maſters of the court nowe livinge.

Jo. Stearle maſter of the chauncery was clark of the parliament, and that of cours, not by patent.

B. Regis 9. R. 2.

And albeit for performance of moſt of the ſervice, which have bene formerly ſpoken of, the knowledge of the common lawe bee moſt requiſite, yet undoubtedlie it was not withowt great ground of reaſon, that auntientlie men ſkilfull in the civill and canon lawes have bene choſen to ſupplie ſomme of thes places. And of that matter thuſſe I think: foraſmuch as all writinges, which paſſe the great ſeale are under the governance of the lord chauncellor; but the care of compoſinge and examininge the ſame appertayned to the maſters, that is to ſay, all things that concearne the diſtribution of lawes amongeſt ſubjects and forrainers, the diſcuſſinge and orderinge of the king's revenewe and patrimony, the authentique publiſhing of leagues and treaties with forraine ſtates and princes, in one word *omnia et ſingula quæ ad expeditionem legum et bonum regimen terræ neceſſario requiruntur*, as the words of the pattent of chauncellor Preſton

Knowledge of the civill and canon lawes.

Pat. 15. R. 2. pa. 1.

* Here follow three or four words in the manuſcript, which could not be read ſo as to make ſenſe of them.—EDITOR.

ranne: they could not well discharge this ther office, except they were indewed with soe great knowledge skill and learninge, that they might informe and assist the lord chauncellor in dispatchinge and judginge maritime, martiall, and ecclesiasticall causes dependinge in chauncerie; the conusance of which causes, both by auntient use and sundrie statuts, appertaineth to the lord chauncellor. As for example, of maritime by the statute of 9. H. 5. c. 7. of 2. R. 2. c. 10. of 31. H. 6. c. 4. of ecclesiasticall by the statuts of 9. H. 6. c. 21. in some sort, but more fullie and largelie of 25. H. 8. c. 29. and of martiall by the close rolle of 14. R. 2. where touchinge a prisoner of warr, by appeale from the constable and marshall, the cawse camme to be debated and determined in chauncerie. And not of thes onely but of causes determinable by the lawe merchant, there lieth appeale from the maior of the staple into the chauncerie, as appeareth by the statut of 27. E. 3. c. 24. Now it is to be understood, that in all cases where the lord chauncellor appointeth delegates for spetiall causes by commission, hee maie determine the same causes, if he thinke good, in chauncerie himselfe, by the advise of the king's counsail there established, or of such others of his other counsailes as hee shall call to assist him, as is to be proved by the records of the Tower, and the aurthoritie of civill and common lawes. Amongest the records it appeareth by the close rolle of 5. R. 2. where a maritime cause coming by appeale into the chauncerie, the parties were called thither to debate the same, and it is there to be found at this marginall note, *de citatione causâ appellationis faciendâ.* This rule is also gathered owt of the title *de officio ejus cujus mandata est jurisdictio* in the Pandects, that *quicunque delegatos dat, potest et ipse recognoscere*; for a delegate is defyned to bee, *cui committitur causa terminanda vel exequenda, vices delegantis representans, et in jurisdictione nihil proprium habens.* And agreable hereunto saieth our Bracton, *rex habet ordinariam jurisdictionem et omnia jura in manu suâ, quæ ne ita deligari possunt quin ordinaria remaneant cum ipso rege.* Nowe these things, which are donne in chauncerie, are not sayed to bee donne before the chauncellor, but before the kinge himselfe, the chauncellor beinge there *loco nomine et vice regiâ*; as it is sayed in the

ib. 1. tit. 21

l. Cant*. 2. c. 2. de ffic. jud.

pud act. li. 2. 24.

* The author thus shortly and obscurely referred to is *Claudius Cantiuncula*. Besides the book *de officio judicis* here cited, he wrote a book intitled *Paranæsis de ratione studii legalis*, which is included in a collection of pieces by various writers on the method of studying law, published by *Nicolaus Reusnerus* in 1588. This explanation is given, because *Cantiuncula* is an author rarely cited; and because the editor wishes to relieve others from that difficulty of understanding the reference which he himself experienced.—EDITOR.

‡ This reference to Bracton is erroneous. But in cap. 24. of lib. 2. in Bracton there is a passage similar to that here given in the text, though the words are not exactly the same.—EDITOR.

the pattent of Thomas biſhop of Durham, lord chauncellor of England; and that thes cauſes *peregrini juris* were not onelie pleaded in chancery, but pleaded there by civilians, I have partlie heard by the report of Fra. Kempt (an experrienſed and diſcrete obſerver of the chauncery courſe) and partlie it appeareth by the booke of 7. H. 6. 11.—Touchinge the cawſes themſelves of the kinde aforeſayed debated in chauncery, I finde thes examples amonge the records: Pat. 1. H. 8. 16.

Concerninge *maritime* cauſes.—Firſt, certaine goods beinge arreſted in ſtrangers ſhips that were ſuppoſed to pertaine to the king's enimies, whither the kinge ſhould have them or not, was debated in chancery, and not before the admirall; whereby it appeareth, that thes cauſes may bee brought into the chauncery, not onlie by appeale, but alſoe originallie or in *primâ inſtantiâ* commenced there. Secondly, I finde a writt directed to the admirall *de recordo et proceſſu in cancellariâ mittendo*, whereby it appeareth, that the chauncellor hath conuſans of marine cauſes by way of evocation or *certiorari*, as hee fetcheth cauſes owt of London and other inferior courts.—Thirdlie, I finde, that, when thes cauſes camme into the chauncerie by appellation, ſometimes judgement and execution was awarded in chauncery; as the cauſe of one Criſtinus Comeſſon, a Hamburgher, between him and Engliſhmen abowt depredation, was adjudged in the chauncery, and thereupon a writt directed to the ſhriefe of Suffolk to make reſtitution to the Hamburghers. Sometimes the chauncellor ſent the cauſe to the juſtices of the king's bench, to bee there detearmined; as a touchinge John Heſbite of Hertipole, in a cauſe of repriſall. Sometimes thes cawſes by writts owt of the chauncery, were referred to the admirall; as unto Thomas *comes Dorſett*, the king's uncle and admirall of England, power was given by ſuch a writt to here the controverſie, and to reſtore the ſhip and goods, if hee ſawe cauſe; and in the ſame there was a clauſe of revocation of aurthoritie formerlie granted by lettres pattent to Thomas Carew and others, becauſe they attended not the ſaied buſines. Further, I finde, that reſolutions, taken by the king's counſaile in cauſes maritime, were expedited by writts under the great ſeale. As by ſuch a writt *Edmundis comes Cant. admirallus noſter* was commaunded to deliver a Flemiſh ſhip, becauſe it had bene before ſett free from arreſt *de adviſamento conſilii noſtri*. In like ſort Thomas Branfort *admirallus noſter auſtralis* was commanded to ſett free a ſhip of Brittaine, taken contrary to the truce *ſuper altum mare per breve de privati ſigilli*; which is ſoe much the more to bee obſerved, as being a thing Cl. 3. H. 6. Cl. 5. R. 2. Cl. 6 H. 4. et paſſim. 17. E. 3. Cl. 1. pat. et 19. E. 3. Cl. 1, pa. tert. &c. et Cl. 9. H. 4. Indict. coron. Cl. 15. E. 3. 1. pa. Cl. 1. H. 3. Cl. 9. H. 4.

Cl. 1. H. 5. thing donne *ſuper altum mare*, which properlie appertaineth to the conuſance of the admirall, as appeareth by a writt of this tenor ſent to him *de jure ſecundum conſuetudinem curiæ admiralitatis faciendo de navibus captis ſuper altum mare et non infra corpus alicujus comitatûs*, as contrariwiſe hee could not arreſt any ſhip in a port withowt warrant under the great ſeale. And commonlie thes warrants were not directed to the admirall, but cheiflie to ſerjants at armes, and ſometimes to mayors, to ſhreifs, to conſtables of hundreds. For auntientlie the governance of the navie, and the conuſance of marine cauſes appertained to the admirall, none otherwiſe, then the governente of the armie and the conuſance of militarie cauſes appertained to the conſtable and marſhall; and that was after the kinge had begoune his jornie, or was at the port readie for it, as appeareth by the 15. R. 2. cap. 3. and they were not auntientlie, nor are not nowe properlie ſtiled admiralls of England (for then ſhould not the lord ſteward of the howſeholde have precedence before them) but *admiralli flotæ navium*, of which moſt commonlie there were too, the one *verſus partes boreales*, and the other *verſus partes occidentales*. Sometimes one had the charge of both fleetes, as *Ricardus comes Arundell* was appointed admirall *flotæ navium* and *Angliæ [quod nota] ab ore Thamiſiæ verſus partes tam occidentales quàm boreales*; and ſithence the phraſe and ſtile of *admirallus Angliæ* camme up. Yet it appeareth, that this aurthoritie is not ſupreame one the ſea; for *Thomas de Lancaſter filius regis et admirallus Angliæ* by another pattent was made *locum tenens regis ſuper mare*.—And of marine cauſes thus much.

Cl. 36. E. 3. Cl. 48. E. 3. et 50 et 51. et Cl. 11. R. 2. et paſſim. Fra. 12. R. 2. Fra. 12. R. 2. Fra. 6. H. 4.

Concerning *eccleſiaſtical* cauſes, they ſeme to have bene handled in chauncery even *de vice ordinariâ* before the ſtattuts 9. H. 6. and 25. H. 8. for in 17. E. 3. I finde *proceſſum habitum inter Lindrick et Wade de cantariâ quâdem*, and in like ſort 29. E. 3. *proceſſus habitus cancellariâ regis inter regem et priorem de Thokeford ſuper eccleſiam de Coſtliam, et ſuper hoc, viſis et examinatis per juſtitiarios et alios peritos de conſilio domini regis hic in curiâ exiſtentibus, &c. viſum eſt eiſdem, &c.* Another in 26. E. 3. where, in a proceſs between John Gogh and William de Cler, *coram rege in cancellariâ*, touchinge a prebend, the lord chaunceller called to aſſiſt him, not onelie the juſtices of the benches, but the archbiſhop of Canterberrie, and ſome other biſhops of the king's counſaile. Laſtlie, upon a petition exhibited in chauncery by William Whorehood, the king's atturnie generall, the rectorie of Lithe, which was in the king's hands by the vacancie of the archbiſhoprick of Yorke, and into which Thomas de Latimer had intruded, was there adjudged to the kinge, with all the meane proffits ſithence the death of Edward the laſt archbiſhop of Yorke;

Cl. 1. pa. Cl. 1. pa. Cl. in 56. H. 8. per cop. rec. de lib. 2. h. Egert. C. R. Johanni Park. C. S.

which

which judgment is entred in Lattin, but the proceedinge therein was after the Engliſh cours of the civill lawe, by examination of witneſſes, &c. as is uſed in other cauſes.

The like examples of *militarie* and *ſtaple* cauſes debated in chauncerie [illegible]einge debated before the king's ſecreat counſaile, expedited by writts out of the chauncerie: as a cauſe betweene the marſhall of England and the maior of London might bee brought, as partlie alſoe appeareth before. Cl. 51.E.3.

All which, ſeinge they are to bee expedited, not in cours of common lawe, but in cours of civill or cannon lawe, it was neceſſarie to aſſiſt the lord chauncellor with ſome learned in thoſe lawes; and the diſtribution and diſpenſation of prohibitions and conſultations, was alſoe more aptlie committed to thoſe of the chauncerie, whoe underſtood bothe lawes, then it cann be exerciſed by thoſe that are cunning in the ſecular lawe onely, whoe notwithſtandinge have of late arrogated the ſame wholelie to themſelves, and by an idle and obſcure multiplyinge of words in the compoſinge of them (contrary to the auntient formes of prohibitions and conſultations expreſſed in the regiſter) have attained this, that the price of a prohibition, from ſeven ſhillings and ſixpence, is riſen to twice ſeven pounds.

I take it therefore to appeare out of the premiſſes, that the knowledge of the common lawes, and that as Fleta ſayeth *plenior*, is requiſit in the maſter, for awardinge *brevia remedialia*, and ſundrie other cauſes: that the knowledge alſoe of the civill lawe, which nowe in a manner is inſteade of *jus gentium*, and of the cannon lawe, which undoubtedlie was compoſed by men of great learninge and underſtandinge, was alſo neceſſarie in them to direct the courſe of moſt things debated in the court, and to open the reaſon of divers things to bee judged there, and to aſſiſt the lord chauncelor in all thes kindes of cauſes; whoe is as it were the fountaine of all kindes of lawes exerciſed in England, and from whome all other courts derive the ſtreames of ther juriſdictions, or maye rather bee reſembled to the ocean, from which all ſtreames doe not onelie *defluere*, but alſoe doe *refluere* into the ſame againe. And not in thes onelie, but in all things that the lord chauncellor determineth accordinge to equitie, in all orders that hee taketh for the government and direction of the court and the miniſters thereof, it were moſt convenient, that hee uſed th' advice and learninge of the king's clarks *ad robas*, being appointed to aſſiſt him as his counſaile; for it often happeneth, that the edicts and decrees of magiſtrates, which are diſpatched and publiquelie propoſed withowt th' adviſe and mature debatinge of ther counſaile, are ſhrewdlie ſuſpected either *ſordium* or *ambitûs*. And upon this point doeth Cicero notablie plaie and invai againſt Verres, Antonius, Verrina 2. Philippica 2.

nius, and Dolobella, that they judged cauſes and made edicts of their own heads withowt the adviſe of ther counſaile or aſſiſtants. And ſurelie the auntient kings of this realme did veiry vainelie and unneceſſarilie beſtowe the charge of mainetaininge ſo many clarks abowt the chauncelor, if they were to ſit idly and unexerciſed abowt him. And therefore, albeit they bee not bounde to give ther adviſe by the formall words of ther oathe, until they be aſked; yet I think it is the lord chauncelor's part to uſe and imploie all thoſe healps and aides, which may ſupport and ſtrengthen his ſentence and decrees with moſt vigor and aurthoritie. Add hereunto, that it will make them the more attentive and to diſcharge ther duties with the more alacritie, if they perſeive, that lord chauncelor maketh account of ther opinions by the queſtions and demaunds which hee ſhall aſke of them.

And to have ſayed thuſſe much of the parts of ther ſervice, and of the learninge requiſit to enable them thereunto may ſuffiſe.

V.

It reſteth to treate of the fees, allowances, and rewards, touchinge which it ſeemeth the world is much changed. For heretofore in 5 R. 2. there was a complaint exhibited againſt them in parliament, that they were over fatt, both in boddie and purſe, and over well furred in ther benefices, and put the kinge to veiry great coſt more then needed; and likewiſe 51. E. 3. one Thomas Theloal would not accept the chauncellorſhip of the dutchie of Lancaſter, but with condition *quòd ſtatus gradus et locus ipſius Thomæ integri et illæſi permaneant, et quòd prædictus Thomas robas regis pro eodem gradu debitas et conſuetas annuatim à cancellario regis pro tempore exiſtente reciperet, et locum ſuum, per clericum ſuum, quem cum hoc duxerit deputand. in hoſpitio ejuſdem cancellarii continuaret.* And in thoſe ordinances, which are tearmed *de* 12. R. 2. it is prohibited, that any curſiter or inferior clark of the chauncery ſhould ſerve as attornie in any other court, between partie and partie, except the kinge would by his lettres pattents make him his atturnie generall, as if there had bene ſome likelihood thereof. But from this envie, into what a ſtate of pittie they are nowe fallen, appereth but even overmuch. Yet let us ſee, what our predeceſſors had, the which in generaltie appeareth by Fleta, *lib.* 2. *cap.* 22. whoe ſaieth, that out of the proffits of the ſeale they ought to bee founde, and that *honeſtè*, both for foode and raiement, *pro victu et veſtitu.* How this *honeſtè* is to bee interpreted, maie partlie bee gathered owt of a booke of all the offices in chancery compoſed in H. 7. his time, found by Mr. Thomas

Forteſkue

Forteſkue amongeſt Warman's papers, and nowe or late in the cuſtodie of Mr. Kederman, where it's ſaied, that 12 *magiſtri, et eorum quilibet, robas, veſturam, ſive liberatam, annuatim, tam hiemalem quàm eſtivalem, de domino rege pro ſe ipſis, ac dietam diurnam de cancellariâ Angliæ pro tempore exiſtent. pro ſe ac uno clerico ac aliis familiaribus ſuis, ſi voluerint eorum quilibet tres clericos ſub ſe ſcribentes, haberent.* Agreable hereunto are the accompts of the hanaper remayninge in th' exchequer; in the beginninge of eatch of which accompts are ordinarilie thes words: *Item domino cancellario pro expenſis ſuis et clericorum ſuorum commenſalium* 500 *l.* For it is to bee underſtood, that auntientlie the clarks and officers of the chancery kept togeather, either in the king's howſe, or in ſome ſpetiall hoſtell appointed for them, where they had lodginge and dyet allowed them, as not onelie by the things above alleadged, but by thes records followinge to bee proved. *Rex voluit, quòd Cliff et Helaſton teneant hoſpitium pro clericis de cancellariâ et officiariis ejuſdem*; and againe, *pro Simone Gaimſtede cuſtode ſigilli pro ſe ac ſociis ſuis et aliis miniſtris cancellariæ ſecum commenſalibus, ut moris eſt, &c.* Now that ther diet was not of the meaneſt, maie appeare many waies. Firſt by the plaint in parliament aforeſayed, for that they grew fatt thereupon. Next by the allowance of 500 l. which in thos daies would have bought as much vittaile as 2500 l. will doe nowe. And thirdlie the particulars thereof doe partlie appeare by ſundrie records, and that there were ſpecial pervaiors of the king's appointed for the bringinge of the ſame into the hoſtell of the chauncery. *De victualibus pro hoſpitio cancellariæ providendis. Pat.* 23. *R.* 2. Againe, *de gallinis vino et cerviſiâ providendis pro hoſpitio cancellariæ. Pat.* 12. *E.* 3. *par* 2ª. But ther wine they had from the butler of England. *Rex Ricardo Delapole pincernæ noſtro ſalutem: Mandamus, quòd dilecto clerico noſtro magiſtro H. de Cliff cuſtodi magni ſigilli noſtri vinum pro hoſpitio clericorum cancellariæ noſtræ liberetis, &c. Cl.* 2. *E.* 3. And againe, *R. pincernæ ſuo ſalutem: Conſuetum feodum vini Michaelis de Wach, ut uno cuſtodum magni ſigilli tenentium hoſpitium cancellariæ noſtræ, liberetis, &c. Cl.* 8. *E.* 3. The quantitie of which wine was 12 tonnes by the yere, for every moneth a tonne, which then was delivered in ſpetie. But nowe the lord chauncelor hath inſteade thereof allowance in money from the butler of England after the rate of 20 nobles the tonne, as I take it. Beſides ther lodginge and ther diett, they had alſo robes of the kinge in ſpetie, not allowance in mony for them; and that by the delivery of the lord chauncellor. *Rex dilecto clerico ſuo Ricardo Thoreſby cuſt. hanaper. cancellariæ noſtræ ſalutem: Quia liberatio robarum de inſtanti æſtate, pro clericis de cancellariâ noſtrâ, propter careſtiam panni et ſendalli, feodum conſuetum per* 7 *l. et* 20 *d. excedit ſicut venerabilis pater Johannes epiſcopus*

Diett for themſelves and ther attendants.

The allowance of the ambaſſadors in France was 13 *s.* 4 *d. per diem. Cl.* 5. *E.* 3. *pa.* 2ª. Nowe it is 5 marks, and will not defray the charges neither.

Robes 24. E. 3. Cl. 1ª. p.

Vid. Cl. 2. H. 5. that then for thes robes *feodum conſuet.* was exceeded 42

pounds, and the Lord Chancelor had allowance accordinglie.

episcopus Wigorniæ cancellarius noster nobis est testificatus; vobis mandamus, quòd eidem cancellario nostro dictas 7 l. et 20 d. prò dictis robis sic emptis de exitibus hanaperii prædicti solvatis, recipientes ab eodem cancellario literas suas patent dictam recept. testificantes, et nos inde vobis in computo vestro debitam allocationem habere faciemus. T. R. Westminster. 12 Maii. R. E. It seemeth moreover, that they had allowance for horsemeate by this recorde of 12 E. 3. *de quo literâ et avenâ pro hospitio cancellariæ providendis.* But it is plaien, that they had allowance of botehire, and that in the best manner.

Pat. part 1.

Ch. 35. E. 3. et 41. E. 3. Botehire.

R. Radulpho Revensore cancellario salutem: Mandamus vobis, quòd lib. dilectis clericis nostris primi gradûs cancellariæ nostræ, pro expensis bargæ suæ ipsos clericos à palatio nostro Westmonast. ubi ipsi prò negociis nostris et reipublicæ sessiones suas communitur tenent, usque hospitium Episcopi Wintoniæ cancellarii nostri, et abinde ad propria ducentis, de exitibus finum in dictâ cancellariâ nostrâ sine dilatione liberetis, recipientes ab eis vel eorum aliquo literas suas patentes hoc testificantes, et nos inde in computo vestro debitam allocationem haberi faciemus. T. R. West. 3 Januar. R. There was also fewill allowed owt of the king's parks for this hostell of the chauncerie; for it appeareth by 15. E. 3. that the kinge beinge at Newcastle, and Parning the chauncellor and Thoresby master of the rolles staying behinde at Northampton, there were writts directed *parcario de Milton et gardiano foresiarum de Sausse et Whitehod de buscâ liberandâ cancellario et custod. rot.* with this clause, *sicut alii ante hæc tempora habere consueverunt.* Besides all thes allowances from the kinge, it appeareth by the yere-bookes of 28. E. 3. 3. and 20. H. 6. 8. but especiallie by the parliament rolle of 4. E. 3. * that rectories and other ecclesiasticall benefices rated 20 marks or under of the king's guift were principallie distributed amongest them, and the rest upon the other clarks of both the benches and th' exchequer *per consilium et assensum magistrorum.* But Wolsie, as they saie, raised it to all benefices under 20 l. and nowe they are disposed *sine assensu et consilio magistrorum.* And thes I take to bee the

Cl. part 3a. Fewill.

Benefices.

* The words of the clause in the rolle referred to are,

"Pur ceo, q'en temps dount memore ne court, fust ordeine et per les progenitours "nostre seignour le Roi, que les chauncellers, que pur le temps serroient, durroient "les benefices que appendoient au Roi a donner, del tax de vint marcs et dedeynz, as "*les clercs de la chauncellerie*, que longement avoient travayle en la place; laquele "chose ad este use du dit temps, tanque l'eveske de Nicol fust fait chauncelle, qui "dona en tut son temps les dites benefices a *ses clercs*, encontre la volunte nostre seig- "neur le Roi, et encontre les ordinances et usage avandites, q. pleise au dit nostre "seignour le Roi et a son conseil ordeiner, que les chauncellers, qui pur "temps serrount, doynent les benefices, que a eux appendent a doner par cause "avaundite, a les clercs de la dite place, sicome a auncienement ad este use, et que de "ceo soit fait *par eleccion de les mestres de la chauncellerie.*"

"Soit ceo bille livere au Roi, et semble au conseil, q'il doit commaunder au chaun- "celler, q'il defore doigne tieux benefiz as cleres le Roi de la chauncellerie, et l'es- "chequer, et des deux baunkes, et ne mye as autres." See Roll. Parl. 4. E. 3. n°. 54.——EDITOR.

substance

ſubſtance of the certaine rewards, which the clarks *de* 1ª. *formâ* had from the prince for extraordinarie paines or longe continuance in the place; or beinge extraordinarilie qualified, they were wont to be extraordinarilie rewarded with ſomes of mony, penſions, grants of licenſes, and of wynes from the butler of England, and with preferment to higher places, of which I have ſeene many preſedents in peruſing the rolles of the chauncerie. Concerninge ther fees from ſuitoss to the court, thoſe that are now left are thes followinge. For knowledinge of deeds, for recogniſances of all kindes, as dett, baile, manucaptions for ſhreifs, oathes for liverie and removinge of extents, for writts *de non ponendo in aſſiſis*, for oathes taken in the office of alienations, the fees are two ſhillings; for an ordinarie affidavit 4d. and they were wont to have a fee of 6s. 8d. for cancellinge of pattents, which nowe amongeſt other things is taken away alſoe. And of thes aforeſaied, the greater part of the ordinarie maſters of the court raiſe little or nothinge. And inſteade of ther robes, which were wont to be delivered them in ſpecie, the one furred, the other lined with tafita [for ſoe the words of the recorde runne, *pannus et furfura* in winter, *et pannus et ſandallus* in ſomer] there is now paied in mony for both 6l. 14s. and yet certaine deductions owt of that alſoe to the clark of the hanaper's man. Soe that it appeareth, that, whereas in auntient time out prediceſſors had lodginge, meate, drink, fier, appairell, attendance, paſſinge beſides benefices or penſions, and many ordinarie fees; nowe wee ther ſucceſſors injoye little or nothinge thereof, and yet our paines and attendance is greatter then thers was.—Let us therefore conſider, whither there bee any probabilitie of recoveringe ſomme of thos things which wee have loſt, and the meanes whowe.

In effectinge of a ſuite three things are eſpetiallie to bee conſidered of, the matter itſelfe, the perſon by whome, and the manner whowe.

Touchinge the matter I take it to bee worthe the laboringe in, ſeinge therein doeth conſiſt the reſtitution of the creddit and proffit that was auntientlie annexed to our places, and ſomme competent recompence for extraordinarie paines, that wee take more then our prediceſſors. As for example:—In matters of *creddit*, to have the matter of precedence betweene us and ſerjants at the lawe debated and ſettled; and concerninge the clarks in the courts of chancerie, to ſeeke to renewe the dependence both of the curſiters and ſix clarks upon us.—In matters of *proffit*, to have the fees of writts that be *magiſtralia* or of grace that be anſwered unto us, and likewiſe the writinge of exemplifications: to have the grant of the chancery ſuppenas *in curſu*, becauſe moſt of the trouble that groweth by thos ſuppenas cometh to our ſhare, and others have all the proffit; to have the examin-

ation

ation of pattents by the privie ſeale as incident to our place, and now injoyed by an abſurd grant: the writinge of commiſſions of appeale, and the compulſarie proces thereupon, becauſe thoſe matters might bee heard in court: and the keepinge of the records in the Tower: the clarkſhip of the parliament to bee diſpoſed to one of our company, as auntientlie it was wont to bee: to have the takinge of reconuſances upon bills to be put into the court according to the ſtatuts thereof made ſtill in force; or otherwiſe to have ſomme ſtipend from the prince, or fee from the partie, for our hearing and reports, ſeinge *nemo militat de ſuo reipublicæ;* and that all others in the realme have; ſoe that Bartolus ſaieth, *duo aurei debentur in initio cauſæ, et alii duo in fine*, that the *Miroer des Juſtices* aſſigneth twiſe as much to the judge as to the counſailer, that commiſſioners in ſpetial aſſiſes have fees allowed them by the auntient lawes and uſaiges of this realme, and that the manner in France is in ſuch caſes to have *taxeurs des eſpices* *.

Touchinge the perſon by whome, ſeinge our places are in the guift of the lord chauncelor, and that ſome of ther places who have withdrawen a great part of our creddit and proffit from us are not in his guift, here is hope of doinge good, if a fitt and opportune time be choſen for the ſame; for not onelie by his interceſſion to the prince ſomme reaſonable allowance may be procured that way for us, but out of his owne authoritie hee may diſpoſe many things unto us.

Touchinge the manner, I ſuppoſe the greateſt point will then be to conſider by what ſteps wee are fallen, and to ſeeke to riſe by the ſame againe. Nowe I take it our fall grewe by becominge *arena ſine calce*, by fallinge aſunder one from another and neglecting the common; and in the meane time thoſe in degree farr our inferiors, by getting themſelves incorporated, have ſtepped before us in proffit exceedinglie, and in trewe reputation alſoe regardinge *poteſtatem juvandi nocendive*. Mr. Lambert touchinge this point was verie earneſt to have us ſuitors for a newe corporation to her majeſtie. I was rather of opinion, that ſithence our number is tearmed in E. 3. time *numerus duodecarius*, it were better to ſtick to our auntient preſcription, then to comme in underneath our inferiors as a puiſne corporation. So may wee remaine at libertie to impugne things by them incroached upon us, which by acceptinge a newe-corporation wee ſhall be eſtopped to doe. Againe, this wee may doe of ourſelves, whereas in the

* Antiently it was the cuſtom in France to give a preſent of ſpices and fruits to the judges on their making a decree. This preſent afterwards grew into a pecuniary tax, and it is ſtill payable to the judges there by the name of *épices*. See the word *Epices* in the *Collection des Deciſ. Nouvell. par Deniſart*.—EDITOR.

other

other wil be delay difficultie and incertaintie. Therefore if halfe a doſen of us would beginne a newe inne of chancery, and kept our commons togeather in the tearme time, I thinke our charge thereby would not bee increaſed; and upon this foundation there would growe order for attendance in court among ourſelves, reſpect unto us from others, which wee nowe want by beinge mingled amongeſt others, and an ableneſs to performe the ſervice of the court the better by our conference. And, as I ſayed before, ſeinge our places are in the chauncellor's guift, time would drawe on to us one thinge after another. Wherein I would wiſh this cours to be holden, that we ſought at firſt rather to renewe the performinge of our dueties withowt gaine, then over-eagerlie to purſue our gaine at the firſt; and I think God would bleſſe our proceedings the better. As for example, wee might appoint certaine ſeſſions, ſuch as our prediceſſors were wonted to holde, where all bills of coſts might bee taxed in the preſence of the atturnies on both ſides. There by motion of the atturnies alſoe might orders be granted by us *de preparatoriis ad judicium*, wherein the client's charge might bee ſaved for his fees both to counſailor and regiſter. The writers of petty bagg would there be plyed, and the bagg ſealed with one or more of the maſters ſeales, all exemplifications and pattents might there be examined, commiſſioners for *dedimus poteſtatem* and for examination of witneſſes might there be nominated, and other things of thes kindes there diſpatched; and this would bee a good meane of renewinge our auntient ſuperioritie over the inferior clarks of the court, and breede a regard in them towards us. If thes things were thuſſe once begoune, then might we treate and endeavor the reſtoringe of our auntient rightes, or recompence for them, with more creddit and reputation, with more commoditie in conſultation, and more readines of contribution; without which thes things I doubt will not be effected.

TWO PIECES

CONCERNING

SUITS IN CHANCERY

BY

SUBPOENA.

I. A Replication of a Serjaunte at the Lawes of England, to certayne Pointes alleaged by a Student of the ſaid Lawes of England, in a Dialogue in Engliſhe between a Doctor of Divinity and the ſaid Student.

II. A Litle Treatiſe concerning Writs of *Subpœna*.

[Theſe pieces are printed from a manuſcript in the Cottonian library at the Britiſh Muſeum. See Cott. MSS. Cleopatra A. 15. The title at the beginning of the manuſcript is, "A Treatiſe concerning Sutes in the Chauncery by *Subpœna*;" to which is added the following notice:

> "Founde amongſte the bookes of Sir Edward Saunders, late cheiſe "juſtice of England, and after cheiſe baron of the exchequer, "and noted by his hande writinge to be entitled on the outſyde, "*The Dialogue betweene a Serjaunte at the lawe and Chriſtopher* "*Seinte Jerman*; and on the inſide, *The Anſwer of this Treatiſe* "*by Chriſtopher Seinte Jerman.*"

Both of the pieces were clearly written in the reign of Henry the 8th, ſoon after the firſt edition of the DOCTOR and STUDENT, which I take to have been firſt printed by John Raſtell in 1523. See Ames's Hiſtor. Account of Printing, 145.]

TWO PIECES

CONCERNING

SUITS IN CHANCERY

BY

SUBPOENA.

PART I.

Heere followeth a Replication of a Serjaunte at the Lawes of England, to certaine Pointes alleaged by a Student of the ſaid Lawes of England, in a Dialogue in Engliſhe between a Doctor of Divinitye and the ſaid Student.

A SERJAUNTE of the lawe of Englond, hearinge the communication and dialogue between a doctour of divinitye and a ſtudent in the lawes of Englond, ſaith to the doctour in this wiſe:

Mr. Doctour, after my mynde ye have righte well declared divers lawes, that is to ſay, the lawe eternal, the lawe of reaſon, the law of God, and the law of man. And you, Mr. Student, have right well ſhewed, howe the lawe of England is grounded uppon the lawe of reaſon, and have ſhewed your mynde therein righte well, againſte which I entend not to repile. But mine entent is, Mr. Student, to repile againſte your opinion in one point in a caſe demaunded of you by Mr. Doctour, which is this*. If a man be bound in a ſingle obligation to paie a certayne ſume of money at a day to the obligee, and the obligor payeth the money at the day and taketh none acquitaunce, neither the obligation wherein he is bounde; and notwithſtandinge this he that hath the obligation bringeth an action of debte upon the ſaide obligation againſte the obligor; ye have ſaide, that in this caſe the obligor hath no remedie by the common lawe at the realme, and ye have ſhewed the cauſe why righte well, as it appeereth by your declaration, the which I need not to rehearſe. But ye ſay farther in this caſe, that the de-

 fendant

* See Doct. and Stud. dial. I. ch. 12. EDITOR.

fendant may be holpen by a *ſubpœna* in the king's chauncerie; and to that I intend to repile. Notwithſtanding I ſhall firſte of all move you, that in this caſe after my mynde the defendant may have remedie at the common lawe. For after this payment, if the defendant bringe an action of debt againſt the obligee and declare upon a prompte, if the obligee will plead that he receaved the ſaid money for the contentacion of his obligation, this plee pleaded in court of recorde ſhall diſcharge the obligor of the ſaid obligation; and if the obligee will wage his law, then the obligor is without remedie; and yet he is at no greater miſcheif than he ſhould be, if he had lent him the money without writing, in which caſe, if the defendant wage his law, the plaintiff hath no remedie in the common lawe, nor yet in the chauncerye againſt his wager of law. I thincke, that in this caſe the obligee cannot wage his law and diſcharge his conſcience. For whan a man is bound in a ſingle obligation, there is a condition implyed in the lawe, that this obligation cannot be diſcharged but by matter in writinge, or by matter of recorde. Than if the obligee would wage his lawe, thincking that it is a ſatisfaction of his obligation, that is not ſo; for the obligation cannot be diſcharged but by matter in writinge or by matter of recorde, and ſo he cannot wage his lawe and diſcharge his conſcience after my mynde: but either he muſt pleade in courte of recorde that he receaveth it in ſatisfaction of his obligation, and than the obligor ſhall be diſcharged; or els he muſt repay the money again, or els he cannot diſcharge his conſcience. Nowe to that ye ſay, that this obligor may be holpen by a ſubpœna in the king's chauncerie. As to that I ſay, after my mynde, that it ſtandeth neither with the lawe of reaſon, neither with the lawe of God, ne yet with the common well of the realme, that this man ſhold be holpen by a ſubpœna in the chauncery. Firſt it is not reaſonable, that for a particular manne's cauſe, which hath hurte himſelfe by his own negligence and by his owne folly, that the good common lawe of the realme (which is this, that the matter in wrightinge with or without condition cannot be anſwered but by matter in writing or by matter of recorde) ſhould be made voyd or be ſet at nought by the ſuite of any particular perſon made in the chauncerie or any other place. But if reformation be had in this caſe in the ſaid chauncerie by a ſubpœna, it muſt needs follow, that this good common lawe muſt be made as voyde and ſet at noughte. For by a ſubpœna the plaintif is prohibited to ſue the common lawe, and is compelled to make anſweare in the chauncery, where the obligor ſhall be admitted to pleade a payment of the debte contayned in a ſingle obligation without writinge, which is cleane contrarie to the common law; ſo that if that be admitted

for

for lawe, the common lawe that is contrary to this muſt needes be no lawe. For theſe two lawes, one being contrarye to the other, cannot ſtande together, but one of them muſt be as voyde. Wherefore it muſt needes followe, that, if this lawe be maintayned in the chauncery by a ſubpœna, the common lawe, which is contrarie to that, muſt needs be as voyde and of none effect. I mervaile moche what authorite the chancellor hath to make ſuch a writ in the kinge's name, and howe he dare preſume to make ſoche a writ to let the kinge's ſubjects to ſue his lawes, the which the kinge himſelfe cannot do rightewiſlye; for he is ſworne the contrarie, and it is ſayde *hoc poſſumus quod de jure poſſumus*. Alſo the king's judges of this realme, that bee appointed to minyſter his lawes of his realme be ſworne to miniſter his lawes of the realme indifferentlye to the kinges ſubjects; and ſo is not the chauncellor. Alſo the ſerjaunts at the lawe be ſworne to ſee the queen's ſubjects to be juſtifyed by the lawes of this realme determinable by the king's judges and not by my lord chauncellor. Yet this notwithſtandinge, if the kinge's ſubjects, upon a ſurmiſed bill put into the chauncerie, ſhal be prohibited by a ſubpœna to ſue accordinge to the lawes of the realme, and be compelled to make aunſweare before my lord chauncellor, than ſhall the lawe of the realme be ſet as voyde and taken as a thing of none effecte, and the king's ſubjects ſhall be ordered by the diſcretion of the chauncellor and by no lawe, contrarie to all good reaſon and all good policy. And ſo me ſeemeth, that ſuch a ſute by a ſubpœna is not onlye againſt the law of the realme, but alſo againſt the lawe of reaſon. Alſo me ſeemeth, that it is not conſoarmable to the lawe of God. For the lawe of God is not contrary in itſelf, that is to ſay, one in one place, and contrary in another place, if it be well perceyued and underſtood, as ye can tell, Mr. Doctour; but this lawe is one in one courte and contrarie in another court. And ſo me ſeemeth, that it is not onlie againſte the lawe of the realme, and againſte the lawe of reaſon, but alſo againſt the lawe of God. Alſo me ſeemeth, that this ſuite by a ſubpœna is againſte the common well of the realme. For the common well of everie realme is to have a good lawe, ſo that the ſubjects of the realme maie be juſtified by the ſame, and the more plaine and open that the lawe is, and the more knowledge and underſtanding that the ſubject hath of the lawe, the better it is for the common well of the realme; and the more uncertaine that the lawe is in any realme, the leſſe and the worſe it is for the common well of the realme. But if the ſubjects of any realme ſhall be compelled to leave the lawe of the realme, and to be ordered by the diſcretion of one man, what thinge may be more unknowen or more uncertaine? * But if this

* *Bonum eſt ſecundum literas et leges, et non ſecundum propriam mentem judicare.*
Ariſtot. in Polit.

this manner of ſuite by a ſubpœna be maintayned, as you Mr. Student wold have it, in what uncertaintie ſhall the king's ſubjects ſtande, whan they ſhall be put from the lawe of the realme, and be compelled to be ordered by the diſcretion and conſcience of one man! And namelie for as moch as conſcience is a thinge of great uncertaintie; for ſome men thinke that if they treade upon two ſtrawes that lye acroſſe, that they ofende in conſcience, and ſome man thinketh that if he lake money and another hath too moche that he may take part of his with conſcience; and ſo divers men divers conſcience; for everie man knoweth not what conſcience is ſo well as you Mr. Doctour: For me ſeemeth, that if the kinge's ſubjects be conſtrayned to be ordered by the diſcretion and conſcience of one man, they ſhold be put to a greate uncertaintie, that which is againſt the common well of a realme. And ſo me ſeemeth, it is not onlie againſt the common lawe, but alſo againſt the lawe of reaſon, againſte the lawe of God, and againſte the common well of this realme.

STUDENT. Howe is it than, that the chancellours of England have uſed this?

SERJAUNTE. Verelie I thincke for lacke of knowledge of the goodneſs of the lawes of the realme; for moſte commonly the chancelours of England have been ſpiritual men, that have had but ſuperficial knowledge in the lawes of the realme; and whan ſoche a byll hath been made unto them, that ſoche a man ſhould have greate wronge to be compelled to paie two times for one thinge, the chancellour, not knowinge the goodneſs of the common lawe, neyther the inconvenience that mighte enſue by the ſaide writ of ſubpœna, hath temerouſlye directed a ſubpœna to the plaintiff in the kinge's name, commaundinge him to ceaſe his ſuite that he hath before the king's juſtices, and to make aunſweare before him in the chauncerie: and he regardinge no lawe, but truſtinge to his owne wit and wiſdom, giveth judgment as it pleaſeth himſelfe, and thinketh, that his judgment being in ſoche authoritie is farre better and more reaſonable than judgments that be given by the king's juſtices according to the common lawe of the realme. In my conceite in this caſe I may liken my lord chaunceler, which is not learned in the lawes of the realme, to him, that ſtands in the Vale of White-horſe farre from the horſe and holdeth the horſe; and the horſe ſeemeth and appeereth to him a goodly horſe and well proportioned in every poincte, and that if he come neere to the place wher the horſe is, he can perceave no horſe nor proportion of any horſe. Even ſo it fareth by my lord chauncelor that is not learned in the lawes of the realme; for whan ſuch a bill is put unto him, it appeereth to him to be a matter of great conſcience and requireth reformation: and the matter in the bill appeereth ſo to him, becauſe he is farre

from

from the underſtandinge and the knowledge of the lawe of the realme and the goodneſs thereof; but if he drawe neere to the knowledge and underſtandinge of the common lawe of the realme, ſoe that he maie come to the perfecte knowledge and goodnes of it, he ſhall well perceive that the matter contayned in the bill put to him in the chaunceerie is no matter to be refourmed there, and namelie in ſoche wiſe as is uſed. Moreover, Mr. Student, I marvaile moche, that ye ſay that men that have wronge maye be holpen in many caſes by a ſubpœna, in ſo moche as you have in your *Natura Brevium* ſevrall writs and divers natures for the reformation of everie wronge that is donne and committed contrarye to the lawes of the realme; and amonge all your writs that you have in your *Natura Brevium*, ye have none there called a ſubpœna, neyther yet the nature of him declared ther, as ye have of all the writs ſpecified in the ſaide booke. Wherefore me ſeemeth it ſtandeth not with your ſtudie, neither yet with your learninge of the lawes of the realme, that any man that is wronged ſhould have his remedie by a ſubpœna. If a ſubpœna had been a writ ordained by the lawe of the realme to reforme a wronge, as other writs in the ſaide booke be, he ſhold have bin ſet in the booke of *Natura Brevium*, and the nature of him declared there, and for the reformation of that wronge it layeth, as it is in the writs contayned in the ſaide booke: and for as moche as it is not ſo, it is a writ abuſed in my mynde contrarie to the common lawe of the realme, and contrary to reaſon, and all good conſcience, and yet is coloured by the pretence of conſcience. But it fareth by that, as it doth by other vices, *quia vitia aliquando mentiuntur ſe eſſe virtutes*; for vice at ſome tyme will untrulie counte itſelfe to be vertue, as pride at ſome tyme will ſhewe himſelfe to be meeke and pretende moche humility to have his pretended purpoſe. And ſo this writ of ſubpœna is colour of conſcience to have that he ought not to have by the lawe of the realme, nor by the lawe of reaſon, nor yet by the lawe of God as I thincke, and by all pretence of conſcience. Mr. Student ye ſpeake moche of conſcience, and you move a queſtion whether conſcience ſhall be ruled after the lawe, or that the law ſhall be left for conſcience. Me thincketh that the lawe ought not to be left for conſcience in no caſe: for the lawe commaundeth all that is good for the common wealthe to be donne, and prohibiteth all things that are evill and againſte the common weale. Wherefore if ye obſerve and keepe the lawe, as in doinge all thinge that is for the common weale, and eſchewe all thinge that is evill and againſte the common weale, ye ſhall not neede to ſtudy ſo muche uppon conſcience; for the lawe of the realme is a ſufficient rule to order you and your conſcience what ye ſhall do in everie thinge, and what you ſhall not do. If ye therefore

follow

follow the lawe truly, you cannot do amiſſe nor offende your conſcience; for it is ſaide, *quòd implere legem eſt eſſe perfectè virtuoſum*, to fulfil the lawe is to be perfectlie vertuous.

STUDENT. That is to be underſtood by the lawe of God.

SERJAUNTE. It is alſo to be underſtood by the lawe of man; for the lawe of man is made principallie to cauſe the people the lawe of God; and ſome ſeemeth, that if ye followe the lawe of the realme truly, ye ſhall not neede to leave the lawe of conſcience.——Moreover, ye ſpeake moche of conſcience, and put manie caſes concerninge conſcience; and though lawe will, yet wether it will ſtand with conſcience. For me to repile and make anſwear to everie one of your caſes, it weare too tedious, and is not myne intente. But myne intent is to moove you to applie your ſtudie principallie to have the verie and true knowledge of the lawes of the realme, and that had and knowen to practice the ſame truly without any crafte or ſubtyle invention; and than you ſhall not neede to ſpeake ſo much of conſcience. But I perceyue by your practice, that you leave the common lawe of the realme, and ye preſume moche uppon your own mynde, and thincke that your conceit is farre better than the common lawe; and thereupon ye make a bill of your conceite, and put it into the chauncerie, ſayinge, that it is grounded upon conſcience; and ſo ye bringe your conceite in argument in the chauncerie, and leave the common lawe as it weare a thinge of no goodnes, ne of no reputation; in the which practice me thincketh you moche abuſe yourſelf. And though my mynde be not to repile againſt every of your caſes, yet my mynde is to repile againſt your ſayinge in your aunſweare made to a queſtion demanded of you by Mr. Doctour in the latter end of the 21ſt chapter, in your ſecond dialogue. And the queſtion is this, to knowe howe uſes beganne, and why ſo moche lande hath been put in uſe? To the which queſtion ye make aunſweare in the 22d. chapter than next followinge, ſayinge, that uſes weare reſerved upon a ſecondarie concluſion of the lawe of reaſone, as ye have declared in the ſame chapter. I ſay under correction and reformation of my lordes and maiſters the judges of the lawe of this realme, that they began of an untrue and crafte invention to put the king and his ſubjects from that which they ought to have of righte by the good true common lawe of the realme: as the kinge's highnes from his eſcheats, his wardes, and his primer ſeaſins, and from other things that nowe come not to my mynde; and his ſubjects from their eſcheats and wardes, women from their dowers, and the huſbandes of ſuch women that be inheritoures from their tenures by the curteſie

teſie of England, the which they ought to have by the lawes of the realm; and thoſe that have good right and tytle to any land to recover it by action after the courſe of the common lawe be put from their actions, and if they bringe their actions to cauſe ſoche delaies that they ſhall never have recoverie. And thoughe ſome of theſe inconveniences be holpen by divers ſtatutes, as ye have ſaide, yet ther reſt manie and great inconveniences more than I can rehearſe at this time that be not remedied; and in ſpeciall one, and that is this. By ſoche uſes the good common lawe of the realme, to the which the kinge's ſubjects be inherite, is ſubuerted, and made a voyde, ſo that none of the ſaide ſubjects can be and ſtand in anie ſurety of any poſſeſſion. For if he claime and proove his tytle by a deed of feofment, the other partie will ſay he was but a feoffee of truſte; and if he clayme by a fyne or by a recovery, he will ſay likewiſe that he was of truſt; ſo that neither deede, ne fyne, ne yet recoverye, which make men's titles by the common lawe, maketh or enforceth any mann's title at this daye; and all becauſe of this falſe and craftie invention of uſes as I thincke. To proove that it beganne upon an untruth and falſe purpoſe, it appeereth by that, that he, which maketh ſoche a feofment, ſaithe and doth one thing and thinketh another thinge cleane contrarie. For he ſayeth by his worde and by his deede, and writinge, and liuerie and ſeaſin, that the feoffe ſhall have the land to him and to his heirs; and his mynde and entent is, that he ſhall not have it, but he will have it himſelfe. What a falſenes is this to ſpeake and do one thinge, and thincke another thinge cleane contrarie to the ſame! Every man may perceave in my mind, that of this can come no goodnes, but crafte and falſehood. And ſo mee ſeemeth, that theſe uſes began by an untruthe and craftie invention, and are continued by an untruthe and for a deceite; and yet do ye, that be ſtudents of the common lawe of the realme, maintaine this untrue and crafty invention in the chauncery by the colour of conſcience, contrarie to the ſtudie and learning of the common lawe, and contrary to reaſon, and alſo to the lawe of God. What reaſon is it, that if I give you my land with all the circumſtances that belong to a guifte of land by the lawe, or levie a fyne or ſuffer a recovery againſt me, and yet I to have the diſpoſition of the land myſelfe! So that it appeareth in my mynde, that theſe uſes began by an untrue and craftie invention, and is maintained in the chauncerie by the colour of conſcience, to the ſubverſion of the good common lawe of this realme, againſte all reaſon, and contrarie to the lawe of God, which teachethe nothinge but truth, not only to the expreſs wronge and hurte of the king's highnes and of all his ſubjects, but alſo as moche as in them

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is to bringe the kinge's highnes to the deteſtible offence of perjurie, as it appeereth by a ſtatute made the 20th yeare of king Edward the 3d*, wherein is contained as heere followeth.—

"Edward, by the grace of God, &c. to the ſheriffe of Staf-
"ford, &c. greetinge. For that, that by divers plaintes made to
"us wee have knowlege, that the lawe of this lande, the which
"we be bound by our oathe to maintaine, is not well kepte, and
"the execution of it diſturbed manie ways by maintenaunce and
"procurement as well in courte as in countrie, wee, mooved
"greatlie in conſcience of this matter, and for that cauſe deſy-
"ring, as well for the pleaſure of God and eaſe and quietnes of
"our ſubjects, as for the ſavinge of our conſcience and for ſavinge
"and keepinge of our oathe aforeſaid, by the aſſente of the
"lords and other ſage wiſe men of our counſel, have ordeyned
"and comaunded expreſſlie to all our juſtices, that they ſhall do
"egall lawe and execution of right to all our ſubjects riche and
"poore without having regard to any perſon, and not to ceaſe
"to do righte for any letters or comaundements that maye come
"from us or from any other, or for any other cauſe whatſoever
"it be; and in caſe that any letters writs commaundements come
"to the juſtices or to their deputies to let the lawe and righte
"after the uſage of the realme in diſturbance of the lawe or of
"the execution of the ſame or of right to the parties, the ſaide
"juſtices and other aforeſaide ſhall go forthe and holde their
"courtes and their proceſs where their plees and buſines be de-
"pendinge before them, as though no ſoche letters writs or
"commaundements weare come unto them, and they to certifie
"us and our counſell of ſoche commaundements, which be con-
"trarie to the lawes as is aboveſaid. And to the ende that our
"juſtices ſhall do egall righte to all men in manner as is afore-
"ſaid, without ſhewinge more favour to one than another, we
"have cauſed our ſaide juſtices to ſweare, that they ſhall not take
"from hencefoorthe as longe as they be in office fee or liverie of
"no man but of ourſelf, and that they ſhall not take guifte ne
"reward themſelves ne by other privelie ne openlie of no man
"that ſhall have to do before them by any manner of waie, ex-
"cepte it be manger and boyer, and that of little value; and
"that they ſhall give no counſell to greate nor to ſmall in caſe
"wher wee be partie, or that toucheth us or may touche us in
"any poincte, upon payne to be at our will both bodie and lande
"and to do our pleaſure in caſe that they do the contrary. And
"for this cauſe we have encreaſed the fees of our juſtices in
"ſoche a manner as it may reaſonablye ſuffice them."

* Lord Coke denies this to be a ſtatute. See 3. Inſt. 224. 146. EDITOR.

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So that ye may perrceave by this ſtatute, that my lord chauncellor nor none other ought to ſend any writ or writinge to any juſtices to let them to proceede accordinge to the common lawe of the realme, the which lawe the king is bound to ſee mayntayned, as it appeereth by the ſaid ſtatute. And all is one miſcheife to ſende a writ, or a commaundement to the partie, that he ſhall not proceed to ſue the common lawe, as it was before the makinge of the ſaid ſtatute to ſende it to the juſtices; ſo that the ſendinge of ſoch a writ or commaundement cannot be juſtified no more in the one than in the other. Notwithſtandinge it is commonlie uſed nowe, ſo that the common lawe of the realme is taken for nothinge, but all the lawe that now is uſed is to determyne what is conſcience, and which is no conſcience, and ſo the common lawe of the realme is nowe adaies by you that be ſtudents turned all into conſcience, and ſo ye make my lord chauncellor judge in everie matter and bring the lawes of the realme in ſoche an uncertaintie that no man can be ſure of any landes be it inheritaunce or purchaſe, but every mannes title ſhall be by this meane brought in queſtion into the chauncerie; and therefore it ſhall be tried whether it be conſcience or no conſcience, and the lawe of the realme, by which we ought to be juſtified, nothing regarded. And ſo in concluſion after my conceite, if this not be reformed by the great wiſdom and policie of my lords and mayſters the judges of this realme, the lawe of this realme will be undone, and all by the meane of theſe uſes and the craftie and ſubtyle inventions that ye that be ſtudents make upon the ſaid uſes.

PART

PART II.

Heereafter followeth a Litle Treatiſe concerning writs of Subpœna.

Whether a ſubpœna ought to lye in any caſe.

The FIRST CHAPTER.

IT appeereth in the kinge's chauncerie in the tyme of ſo manie noble princes and kinges of this realme, and in the tyme of ſo manye of their chauncelers, whereof ſome have bin ſpiritual men, and ſome temporal men, that ſo manye have bin put to aunſweare upon writs of ſubpœna in the chauncerie, that it is not to preſume, that the chauncelors have directed them temerouſlie in the king's name without authoritie, but rather by good autoritie, and by commaundement of the kinge and his counſil, and by knowledge of all the realme. For els it were rather to preſume, that they ſhould longe before this tyme have utterlie bin annulled and put awaye; and becauſe they have bin ſuffered to continewe ſo long, it is to ſuppoſe, that in ſome caſes they may be lawfullie awarded. Alſo it appeareth in divers years of termes, that manye times whan the chauncellor hath bin in doubte in matters that have depended before the king in his chauncerie upon ſubpœnas between partie and partie, that he hath aſked advice of the juſtices, ſome time whether a ſubpœna lay in the caſe or not, and ſome time admittinge that the ſubpœna hath lyen in the caſe, a doubt hath ariſen upon matter that the defendaunte hath pleaded in barre of the ſubpœna; and manye times the juſtices in ſoche caſes determined, that a ſubpœna hath lyen, and ſome time have reaſoned to the doubt that hath riſen betwixte the parties admittinge the ſubpœna to lye, and ſo hath the defendaunte donne and all his councel; and there be ſo many caſes reported thereof, that it needeth not to recite them here. Alſo by the ſtatute made in the 17th yeare of the king R. the 2d. it is enacted, that a man wrongfully vexed by a ſubpœna ſhall recover his damages by advice of the chauncelor. And in a ſtatute made in the 15th yeare of the kinge H. the 6th. it is enacted, that no ſubpœna ſhall be graunted till ſuretie be founde to ſatisfie the partie grieved of his damages, if the matter in the bill be not prooved

prooved true. By which ſtatutes it appeereth, that in caſe that the defendant be righteouſly vexed in the chauncerie, and be ſued upon a true cauſe, he ſhall recover no damages; and therebye appeereth that they that weare of the parliament at the makinge of the ſaid ſtatutes aſſented, that in ſome caſes a man mighte be righteouſlye ſued in the chauncerie, and that they intended to ſet the diverſitie of the recoverie of damages, whether he was righteouſly ſued and whether not. And if it be ſaid it is againſt the ſtatute of the 2d. and 20th. of E. 3. and alſo againſt diverſe other ſtatutes, which will, that the juſtices ſhall not ſurceaſe to do right for the graunde ſeale, or privie ſeale, nor for none other commaundement of the kinge, it maye be aunſweared, the ſtatutes are to be underſtood, wher ſuche commaundement is directed to the juſtices, that they ſhall not therefore ſurceaſe to do juſtice; but a ſubpœna is alwaie directed to the partie and not to the juſtices, whether there be any ſuite hanginge thereon in the court or not, and than whan the partie by reaſon of the ſaid mination ſurceſſeth to call upon the juſtices for any more proceſſe, they furces alſo to give it him: but if the mination weare delivered to the juſtices, commaunding them to ceaſe, and notwithſtandinge the partie calleth for juſtice, there I thincke the juſtices are bound by reaſon of the ſaid ſtatutes to proceede and to do juſtice, the ſaid mination notwithſtanding. And me thincketh, that all theſe things well conſidered, no man oughte to mervaile, what authoritie the chauncellor hath to make ſoche a writ of ſubpœna in the king's name; for the old cuſtome not reſtrayned by any ſtatute, warraunteth him by reaſon of his office ſo to do, after certaine groundes, and under certaine manner, as I ſhall partlie touche heereafter in this litle treatiſe, to give other occaſion to ſpeake further therein hereafter.

Heere followeth one conſidereation, whie it hath been thoughte reaſonable, that a ſubpœna ſhould lye.

The SECOND CHAPTER.

THERE is a ground in the common lawe, that a declaration muſt be certaine; ſpecialle that it muſt ſhewe, who bringeth the action, againſt who it is brought, and what thing is demaunded; and moſt commonlie it muſt ſhew alſo the daye and yeare whan the cauſe of the action began. And becauſe it hapneth

neth manye times, that ſome manne, that hath righte to evidences that be in another manne's hande, and that neyther he under lock nor ſeale cannot ſhewe the verie certainty howe manie deeds there be, or if it be but one deede, yet percaſe he cannot tell the name of him that made the deede, nor of him to whome it was made, ne peradventure the certaintye of the lande compriſed therein, nor all the towne's names where it lyeth, wherefore he is without remedie by the courſe of the common lawe; there it hath bin thought reaſonable in tymes paſt, that a ſubpœna ſhould lie for him that hath righte, and rather to ſuffer him to have righte there, than to leave him without remedy in all places. And this is one of the moſte common caſes where a ſubpœna hath bin ſued in times paſt. And here it is to be noted, that it is not againſt the common lawe; tho' the party have remedy in the chauncery in the ſaid caſe, though he can have none by the common lawe. For the common lawe doth not prohibite, but that ther ſhall be remedye in the chauncerie in the ſaid caſe, and other like; and if it did, it wolde be harde to proove that prohibitation weare reaſonable. Wherfore the reaſonableneſs of the lawe doth ſuffer it, rather than it would breake his rules and groundes, and to ſuffer the plaintiff to have an action, and coulde not declare nor ſhewe whereof he brought his action.

Another conſideration why it ſhould ſeeme reaſonable, that a ſubpœna ſhould be graunted.

The THIRD CHAPTER.

THERE is a maxim in the lawe, that a rente, a common, annuitie, and ſoche other things as lye not in manuel occupation, may not have commencement, ne be granted to none other, without writing. And thereupon it followeth, that if a man for a certaine ſume of money ſell another forty pounds of rente yearly to be percepted of his landes in D. &c. and the buyer thincking that the bargaine is ſufficient aſketh none other, and after he demaundeth the rent, and it is denied him, in this caſe he hath no remedie at the common lawe for lacke of a deede; and therefore in as moche as he that ſolde the rent hath *quid pro quo*, the buyer ſhall be holpen by a ſubpœna. But if that graunte had bin made by his meere motion without any recompence; ther he to whom the rent was graunted ſhold neither have had remedie by the common lawe nor by ſubpœna. But if he that made the ſale of the rent had gone farder, and ſaide, that he before a certaine day

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wold make a ſufficient graunte of the rente, and after refuſed to do it, there an action upon the caſe ſhold lye againſt him at the common lawe; but if he made no ſuch promiſe at the makinge of the contracte, than he, that bought the rente, hath no remedie but by ſubpœna, as it is ſaide before. And the ſame lawe, which is of a rente that had no beinge, but is ſolde as a rente newlye to beginne by the ſale, is of a rente that had beinge before, and is ſolde without deede for a certaine recompence, as is before rehearſed.

Another conſideration why it hath binn thought reaſonable, that a ſubpœna ſhold be graunted.

The FOURTH CHAPTER.

IN the ſtatute, that is called *Quia emptores terrarum*, it is enacted amonge other thinges, that it ſhall be lawful for every freeman to make a feoffment of his landes or of parte of his lands to whom he will, ſo that the feoffee holde alwaie of the chiefe lord of the fee. By reaſon of which ſtatute if a man ſithe that ſtatute made a feoffment without deed or by deed polle reſerving a rente, that reſervation is voyde as for any remedye that ye ſhall have by the common lawe. And ſo it is if a man being ſeaſed of lands for terme of life graunte over his whole intereſt without deede or by deede polle as is aforeſaide reſerving a rent, that reſervation is voide in the lawe as for having any remedie by the common lawe; for there is a maxime by the lawe, that a reſervation of rente ſhall not ſtand in effect, unleſs he that maketh a reſervation have a reverſion in him, or elſe that the lande may be holden of him by that rent reſerved as it mighte have bin before the ſaide ſtatute of *Quia emptores terrarum*: and therefore ſythe it cannot be holden of him, becauſe of the ſaid ſtatute, and ſeinge alſo that he hath no reverſion in him, therefore for that reſervation he ſhall have no remedy in the courtes of the common lawe, as in the kinge's bench the common place and other courtes of lower autorite than they be. And the very reaſon why it is ſo is, becauſe the maximes and cuſtomes of the lawe hath given no remedie in that caſe; for tho' a man have righte by the lawe, yet ſome time he ſhall have no remedie by the lawe, but it is as voyde as for any remedie he ſhall have at the common lawe as is aforeſaid, but yet is good by the lawe of reaſon. For reaſon will, that, for as moche the entente of the parties was that the rent ſhold be paide, and that the feoffee take

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the land to the ſame entente and hath the profits of it, he ſhould paie the rent according to the agreemente. And if any man wold ſaye, that this reſervation is voyde to all ententes, becauſe it is againſte the lawe, for if it be againſte the lawe either it is voyde or elſe the lawe is voyde; and therefore if a ſtatute were made that all reſervations of rentes out of landes ſhould be void; and than a man contrarie to the ſtatute wold make ſuch a reſervation, that reſervation were voide in lawe and conſcience, for it were directlye againſte the ſtatute; and that it ſhold be ſo in likewiſe in this caſe: to that it may be aunſwered, that tho' it be voyde in that caſe, yet it is not like in this caſe. For in this caſe there is no lawe, that prohibiteth for the reſervations to be made, but if they be made the lawe judgeth them by the rules of the lawe of the realme, that there ſhall be no remedie for them by the common lawe as it is ſayde before; but taking the lawe of the realme to be grounded as well upon the lawe of reaſon and the lawe of God as upon the ſaid cuſtomes maxims and ſtatutes, as it is indeede, for els it weare a verie groſs lawe and farre inſufficient, and alſo againſte reaſon in manie thinges, than is the reſervation good in the lawe of the realme. So generallie taken upon all his grounds, howbeit that yet in that caſe there is no remedie for that that is reſerved in the king's courtes of the common lawe, as is ſayde before, but yet the lawe is not againſte it, but that remedye may be had therefore in the chauncerye.

Another conſideration why it ſhold ſeeme reaſonable, that a ſubpœna ſhold be granted.

The FIFTH CHAPTER.

THERE is a maxime in the lawes of England, that if a man bringe an action of debte upon an obligation, the defendant ſhall not be receaved to pleade *nihil debet*, that he oweth nothing, but that he ſhall be compelled to pleade an acquitance or ſome other thinge of as high nature in the lawe as the obligation is. And of that it followeth, that if a man that is bounde in an obligation paye that money and taketh an acquitance and after leeſeth the acquittaunce, and thereupon the obligor bringeth an action of debte upon the obligation againſt the obligor, in this caſe the obligor hath no remedie to helpe himſelfe at the common lawe, but ſhall be compelled by the common lawe to paie the money againe, and than as it is ſayde

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in a dialogue called the 1ſt Dialogue in Engliſhe betweene a Doctour of Divinity and a Student the 22d chap. he that hath no remedie but by a ſubpœna, which as is ſayd there he ſhall well have. And to that ſayinge an exception is taken by a certaine perſon in a treatiſe that he hath made in the name of a Serjaunte at the lawe, wherein he aſſigned divers reaſonnes and conſiderations why a ſubpœna ought not to lye in that caſe.

And one cauſe that he alledged is this. He ſayeth, that the defendant in that caſe may have ſufficient remedie by the common lawe, ſo that he needeth not to take a ſubpœna. And his reaſon is this. He ſaithe, if the obligor after the payment will bringe an action of debte againſte the obligor, ſuppoſinge that he lent him the money, that than, if the obligee will plead that he received the money for the contentation of his obligation, this plee thus pleaded in courte of record ſhall diſcharge the obligor of the ſaid obligation.—And me thincketh, that his reaſon is not made accordinge to the grounds and learninge of the lawe. For in an action of debte upon a prompte it is no plea to ſay, that he receaveth the money in contentation of his obligation or of another dutie, or that there was no ſoche a prompte, ne any other matter like that amounteth to the general iſſue; but he ſhall be compelled to take the general iſſue, or be condemned for lacke of aunſweare. And if he pleade that ſpeciall matter before rehearſed, and conclude over to the general iſſue, (that is to ſay) "and ſo he oweth him nothinge," than is the ſpecial matter wayved, and all the effect of the plea reſteth upon the general iſſue; which is cleer with the obligee; for he receaveth the money as a contentation of his obligation, and not as a lone; and though the obligor after the payment leeſe his acquitaunce, that cannot hurte the obligee, ne alter the nature of the payment that was made before. Wherfore whether he put him on the cuntrey, or wage his lawe, it is cleare for him in lawe and conſcience, and ſo me thincketh that this reaſon maketh tytle for that purpoſe.

The ſecond reaſon that he maketh that a ſubpœna ſhould not lye in this caſe is this. He ſaithe, that it is not reaſonable, that for a particular man's cauſe, which hath hurte himſelf through his owne negligence and by his owne follie, the good common lawe of the realme, that is this that matter in writinge without condition may not be aunſwered but by matter in writinge or by matter of recorde, ſhould be made voyd or be ſet at noughte by the ſuite of any particular perſon in the chauncerie or in any other place. And than he ſaith furder, that if reformation ſhold be had in the chauncerie in this caſe, it muſt needs followe, that the common lawe muſt be voide and ſet at nought; for theſe two lawes being, as he ſaith, one contrarie to another, cannot ſtand together.—To this it may be anſwered, as mee thincketh, that though it be prohibited by the common lawe that a man ſhold not

pleade a payment againſte an obligation without wrightinge, and that in the chauncerie he ſhall, that yet the lawe in the one courte, and in the other, as to the righte of the debte, is all one. For the judges of the common lawe knowe as judges by the grounds of the lawe, that the payment ſufficientlie diſchargeth the debt in reaſon and conſcience, as the chauncerie doth; but yet they may not by the maximes and cuſtomes of the lawe admit the onlie payment for a ſufficient plee before them, not for that they thincke it not ſufficient in reaſon and conſcience to diſcharge the debte, but that they may not breake the grounds and principles of old tyme uſed in the courtes where the action is taken. But the common lawe pretendeth not, that the maxime ſtretcheth to all courtes, nor to the whole common lawe, but to certaine courtes accordinge to the cuſtome before time uſed. And, therefore, at this day if an action of debte be broughte upon an obligation under the ſome of 40s. in the countye, hundred, or courte baron, the defendant ſhall wage his lawe; and in London the defendant ſhall confeſſe the deed, and praie that it may be enquired of the dutie. And ſo it is oftetymes ſeen, that ſeveral courtes have ſeveral cuſtomes, and the lawe ſuffereth them all: as in the common place an outlagrie ſhall be ſome time reverſed without a writ of error, and in the kinge's bench no outlagrie ſhal be reverſed without a writ of error; and alſo in the common place upon the firſt defaulte in a *ſcire facias*, execution ſhall be awarded, and in the kinge's benche an *alias* ſhall be awarded. And why may than the ſaid maxime holde in the kinge's bench and common place, and in ſome other courtes of recorde as be holden after the common lawe, and yet not be holden in the chauncerie? And I wold thinke further, that if it were enacted, that upon an obligation every man that wold might have a ſubpœna in the chauncerie, it were than no greate doubte but that the defendant in ſoche a ſubpœna, might pleade a paymente againſt the obligation, without offendinge the common lawe. And yet if an officer of the chauncerie after that ſtatute ſued another upon an obligation by the privilege of the chauncerie, in that ſuite the defendant ſhould not pleade a payment without wrightinge. And if ſuch diverſitie of pleadinge ſhould be ſuffered in one courte, it is little mervayle than tho' it be ſuffered in ſeveral courtes. And than it followeth furthermore thereupon, that if the defendant in that ſuite taken againſt him by the priviledge of the chauncerie, as is ſayde before, hath payde the money, and hath taken none acquitaunce, than he hath no remedie but upon a bill conteyninge the matter to deſire, that the plaintiff may have an injunction to ſurceſe in that ſuite there taken in the chauncerie after the maximes of the common lawe, and to anſwer to his bill there after the lawe uſed upon

writs

writs of ſubpœna. And yet no contrarietie be in it. For the common lawe claimeth not, that that maxime ſhold ſecure in any other place but at the common lawe, and that onlie in courtes of recorde, as is ſaide before. And it ſeemeth a greate reaſonablenes in the lawe, that it willeth the ſaid maxime to ſtretche to no other courtes but to the courtes of the common lawe. For if did, it ſhold ſeeme to be far unreaſonable; for certaine it is, that if the money be paide, the debte in reaſon and conſcience is diſcharged, though ther were no acquittance made, and than that maxime ſhold univerſallye put the partie that hath paide the money without acquittance from all remedie. And therefore me thincketh it ſhold more commend the common lawe that it ſuffereth remedie to be had in this caſe in the chauncerie, than it ſhold do if it ſhold cleerlie prohibit it. And therefore they ſpeake rather againſte the common lawe, that would ſo have it, than with it. And if any man wold ſay, that if ſoche remedye may be had in this caſe in the chauncerie as I have ſayd before, that than the ſaid maxime is voyde and ſerveth to no purpoſe; for upon every obligation ſoche ſurmiſe may be made though the money be not paide, and ſo ſhall all plaintiffs be delayed by ſoche ventrewe ſurmiſes: to that it may be aunſwered, that if he that maketh the ſurmiſe cannot proove his bill, he ſhall yielde damages to the plaintiff, and the plaintiff ſhall alſo proceede at the common lawe. And alſo it ſerveth to this purpoſe, that it maketh them that be bound the rather to take acquittance or the obligation in lieu of acquittaunce, wherby ſhall followe the playner reckoning and the leſſe variaunce amonge the people; and if that maxime weare not, manie defendantes wold pleade a payment or that they owe nothing, though it be ontrue, that will not ſue to have a ſubpœna and find ſuretie to paie damages if he cannot proove his bill to be true, knowing it to be untrue. And thus me thincketh, that the ſaide maxime is good and reaſonable, and alſo profitable to the common wealth, though remedie may be had in the chauncerie, as is aforeſaid.

Another conſideration whie it hath binne uſed that a ſubpœna ſhould lie.

The SIXTH CHAPTER.

IT hath bin uſed, that when feoffees have been ſeazed to the uſe of a man and his heyres, and that they have bin required to make eſtate accordinge to the uſe that they were infeoffed to do it, that than he to hoſe uſe they be ſo ſeized ſhould have a ſubpœna to cauſe them to make the refeoffment unto him. But if a feoffment be made to the uſe of a taile, and it was agreed that the feoffees ſhall ſtande ſtill ſeized to the uſe of the tayle without makinge any eſtate thereof, than in that caſe there lyeth no ſubpœna againſt the feoffees to make eſtate. But if the tenaunte in tayle in uſe after the uſe made in tayle had graunted to the feoffees, that they ſhold ſtand ſtill ſeaſed without making any eſtate to him or to the heirs of his bodie, in that caſe if the tenaunte in tayle die, his heyres maie have a ſubpœna againſte the feoffees, if they refuſe to execute the ſtate truly; for the tenaunte in tayle had no power to bind his heyre, but that he mighte aſke of the feoffees execution of the tayle if he liſte. And this was woonte to be the moſt common caſe wher a ſubpœna was ſued till the ſtatute of Richard was made. But yet ſithe that ſtatute, though the feoffer maye enter and make a feofment, yet he maie have a ſubpœna to cauſe the feoffees to make him eſtate if he will. Alſo if feoffees of truſte graunte a rente charge, the feoffer hath no remedie to diſcharge that rente by the rules of the common lawe, but by a ſubpœna. And as an uſe is of landes, ſo there may be of goodes and debtes. And ther be ſo manye diverſities, wher a man ſhall be ſeized to the uſe of another and wher not, and wher a ſubpœna lieth againſte them that be ſeized to the uſe of other to make them eſtate and to maintaine actions to ther uſe and wher not, that it wold aſke a ſpecial treatiſe to declare it. And therefore I omit the articles for this time, and ſhall only touche howe uſe firſte began. Wherein I will followe a lytle treatiſe in Engliſhe called the Second Dialogue betweene a Doctour of Divinitie and a Student in the Lawes of England, wher it is ſayde as in the 22d chapter thereof appeareth, that uſes were reſerved by a ſecondarye concluſion of the lawe of reaſone in ſuch manner as in the ſaide 22d chap. appearethe. Againſte which ſaying the ſame perſon of whom mention is made befoſe in the ſaid treatiſe taketh exception, and ſaith that they began, as he thinketh,

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of an untrue and falſe purpoſe, which he ſaith appeereth by that, that he which maketh ſoche a feofment ſaith and doth one thinge and thincketh another cleane contrarie. For he ſaith, that he ſaith by his word and by his deede and writinge and liverie and ſeaſin that the feoffee ſhall have the lande to him and to his heirs; and yet his mynde and his intent is, that he ſhall not have it, but that he will have it himſelfe. Then ſaith he further, what a falſenes is this, to ſpeake and do one thinge and to thincke another cleane contrarie to the ſame! Every man may perceave, ſaith he, that therby maye come no goodnes but crafte and falſhoode; and ſo he thinketh, that uſes began by untrue and craftie invention, and are continued by an untruth and for a deceite. And at this reaſon ſome what I mervayle. For me thincketh it is not grounded accordinge to truthe; for moſte commonlie when feofments of truſte be made, the feoffer maketh the feoffees or at leaſte ſome of them privie to his intente, for commonlie ther is no feofment of truſte made by deede, though it may be otherwiſe, but is ſeldom ſeen; and than the feoffees or one of them muſt take livery of ſeaſin, or els make a letter of attorney to take it. What falſhood than is it, whan the feoffees or part of them be made privie thereto! And admit that none of them be made privie, as ſome time it maye be, as if a man make a leaſe for a terme of life the remainder to certaine perſons to his uſe, and they knowe not of it, ne never gave any money ne other recompence for it; what falſnes is there, though the leſſor after the death of the tenaunte for term of life take the profits? I ſee none. And therefore all the doubt is whan ſuch a feofment of truſte is made, wherby it appeereth by the wordes of the deede, and as the verie trothe is, that the land is given to the feoffees as to the poſſeſſours, howe an uſe may be reſerved by the lawe contrarie to the word. And yet doth the lawe ſuffer ſuch a reſervation of an uſe upon ſuch groundes as in the ſaide dialogue is ſpoken; and therefore if any defaulte be it is in the lawe, for the partie ſheweth commonlie what his entente is to do if the lawe will ſuffer it; and becauſe the lawe doth ſuffer it, it taketh effect accordingly; that is to ſaie, that the feoffees ſhall have the poſſeſſion and another the uſe, which uſe manie times is appointed to be made by indentures of marriage or of bergeynes and ſales or to declare their wills, and that many times by the advice of learned council nor of no crafte nor falſhood. But yet whether it were good to breake all uſes or to let them ſtande, I will not treate of at this time; for it is not the entente of this writinge. And if they ſhold be broken, the cauſe to breake them were not, becauſe they began of crafte and falſhood, as in the ſame treatiſe is ſayde, but for unquietnes and trouble that cometh by them, and ſpeciallie by uſes in tayle. And as to

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the miſcheiſe that is alledged in the ſame treatiſe that cometh by them by loſſe of eſcheats and by avoidinge tenauncie by the curteſie and in dower and ſoche other; me thincketh it is little to be regarded; for though it be certaine, that where ſoche tytles be once given by the lawe that it is againſt righte and conſcience to take them from them that they be ſo fallen unto, yet to prevent their tytle therein, ſo that no tytle ſhall come it is not againſte conſcience, ſo it be not doone of an evill will to him that the title ſhold fall to. And therefore if a man that holdeth by knight's ſervice being ſicke and like to die marrieth, his ſoone beinge within age, becauſe he wold have the halfe of his marriage himſelfe to paie his debtes, he doth no wronge to the lord. And ſo it is in all the caſes that be ſpoken of in the ſaide treatiſe wher ſuche tytles be put awaie by meanes of uſes. And likewiſe if a man that hath no heyre generall nor ſpeciall ſelleth his lande, or giveth it awaye, to the entente that it ſhold not eſcheate, he doth no wronge to the lord. And theſe articles and the articles that are treated of in the 5th chap. make me ſome time to conjecture, that the ſaide treatiſe was not made by any ſerjaunte at the lawe, as it is entytled to be, but of ſome other, that, as it ſeemeth, had a zeale to the lawe, though peradventure ſome of the motions that he maketh weare rather to the diſcommendation of the lawe than to the commendation of it. For what praiſe weare it to the lawe to prohibite all writs of ſubpœna, and yet no remedie to be therein at the common lawe? But if remedie were provided at the common lawe, it were the leſs force, if writs of ſubpœna were put awaie. But in ſome caſes wher ſubpœnas lie, it were verie harde to provide any remedie to be at the common lawe, as in the caſe of the evidences whereof the partie knoweth not the number, and wherof mention is made in the 2d chapter. And alſo in divers other caſes, whereof I intende to touch briefly by certaine caſes and grounds, a man ſome time may have righte to a thinge in conſcience, and where he has no means to come unto it at the common lawe, and yet there lieth no ſubpœna.

Heereafter

Heereafter followie divers caſes and groundes, whereby it appeareth, that a man may have righte in conſcience which he cannot come unto by the common lawe, and that yet he ſhall have no ſubpœna.

The SEVENTH CHAPTER.

IF lord and tenaunte be, and the tenaunte holdeth of the lord by knighte's ſervice and certaine rent; the lord diſtreyneth the tenaunte's beaſtes, and thereupon maketh avoure upon his ſuppoſinge that he holdeth of him by fealtie and certaine rent, and ſo thereupon hath returne; and after the tenaunte dyeth, his heyre beinge within age: in this caſe the lorde is concluded, as againſte the heyre to ſay that his aunceſter held of him by knighte's ſervice, and that is, by reaſon of the ſaide avoure, whereby appeereth of record that he himſelfe averred the land was holden of him in ſoccage; and yet the trothe is, that the tenaunte holdeth of him by knighte's ſervice. And therefore if he bringe a writ of intruſion, *maritagio non ſatisfacto*, againſt the heyre at lawful age, and the heyre pleadeth the ſaid recorde againſte him by way of concluſion, the lord is without remedie at the common lawe, and yet he ſhall have no remedie by ſubpœna in the chauncerie; for if he ſhold, he would ſaie directlie againſte that which he affirmed before in the kinge's courte of recorde; and therefore though he have righte, the chauncerie will ſuffer him to be without remedie, as for any helpe that he ſhall have of the lawe, rather than to ſuffer ſoche an open contradiction to remaine of recorde in the kinge's courtes, and rather than it will give him remedie againſte his own confeſſion. But yet in this caſe the heyre is bounde in conſcience to reſtore him the value of his marriage, and the profits of the lande during the nonage; yet he is not compellable thereunto by no lawe. And alſo againſte all other ſtraungers that wold take the wardes of the ſaid heyre, the lorde may have good remedie by the common lawe; for none ſhall have advantage of that eſtopel, but they that be partie or privie to the ſaide recorde.

Alſo if a man levie a fine with proclamation of lande, that he knoweth another man hath right to, and he giveth him no notice thereof; after this five years paſſe without claime, whereby he that had the right is barred in the lawe; yet he that levied the fine is bound in conſcience to reſtore him that had the righte, for he wittingly deceaved him, and did as he ſhold not have bin done unto. And yet though he be bounde in conſcience to reſtore him, there lieth no ſubpœna to compell him thereto; for there is no ſubpœna directlie againſte a ſtatute, nor directlie againſte the maximes of the lawe; for if it ſhold lie, than the lawe ſhould be judged to be voyde, and that may not be done by no

courte

courte but by parliament. And therefore if a man procure a collateral warrauntie to extincte the right of another, and the warrauntie descendeth upon him that hath righte, whereby he is barred of the lande in the lawe; though he that procureth it be bounde in conscience to restore him that had righte, yet he shall have no subpœna to compell him thereto, for the cause before remembered; for the lawe is, that he shall be barred not onlie in this courte or that, but generallie. And therefore if it were enacted, that if an alien came thro' the realme as a pilgrime and dyed, that all his goods should be forfeite, this statute weare againſt reason and not to be observed in conscience, and yet there shold lie no subpœna for the executors of the pilgrime; for if ther shold, then shold the chancelour give judgment directlie againſt the statute, and that may not be in no wise; but if the statute be not good, it must be broken by parliament as it was made. And so it is of the cases of the fyne with proclamations, and of the collateral warrauntie before remembred.

Also if the graunde jurie in atteynte affirm a false verdicte given by the pettite jury in assise, yet ther lieth no subpœna, tho' the partie hath righte and hath no remedie at the common lawe. And that for two causes.—Whereof one is, whan the common lawe hath goone as farre for remedie as the lawe sufferetli, so that there can be there no furder tryall, if than the partie should have a subpœna, than the common lawe should have no ende, and thereupon shold fall manie inconveniences. Wherefore the party shall rather be suffered to be without remedie than the inconvenience shold fall. But in that case he that hath the land is bounde in conscience to restore, if he will save himself from dedlye synne, tho' he cannot be compelled thereto by no lawe.—The other cause is this. There is a statute made in the 4th yeare of king Henrye the fourth in the 22d * chap. that judgments given in the kinge's courtes shall not be examined in the kinge's chauncerie, parliamente, nor els wher, but by error or atteynte. And therefore if a subpœna shold lie, it should be directly againſt the statute §. And like lawe is if the defendant in an action of debt upon a contracte wage his law untrulie, wherby the plaintiff is barred; yet in that case he hath no remedie by subpœna, for the causes aforesaid.

* Chap. 23. in the printed statutes. EDITOR.

§ It has been long settled, that notwithstanding the 4th of Henry 4. our courts of equity may relieve as well *after* as *before* judgment at law. However, in lord Coke's time, and for some time after, it was a controverted point. Those, who wish to trace this controversy through its several stages, will be able to gratify their curiosity, by consulting the following books: namely, Cro. Jam. 335. 343. 3. Bulstr. 115. 3. Inst. 122. 4. Inst. 85. Car. Rep. 144. 163. March 83. Hardr. 23. 120. 1. Mod. 59. T. Raym. 227. Juriſd. of Chanc. vindicated at the end of vol. 1 of Rep. in Chanc. and Sir Rob. Atkyns's Enquiry into the Juriſd. of Chanc. 39. EDITOR.

Also

Alſo if a man buy goods of another for a certaine ſum of money, and after maketh his executors and dyeth, in that caſe ther lyeth no action at the common lawe againſt his executors; becauſe their teſtatour mighte have waged their lawe, and they may not; and therefore the law for eſchewinge of a greate inconvenience and miſcheif that mighte followe to all executors, if ſoche actions ſhold be maintayneable againſte them upon a bare ſurmiſe, and where their teſtatour, if the action had bin brought upon an untrue ſurmiſe, might have waged his lawe and they may not, will not ſuffer any action in that caſe to lye againſte them *. And than I have heard this taken for a grounde, that whan the common lawe putteth a man from his remedie, tho' he have righte, for eſchewinge of an inconvenience that mighte followe upon it, and that than if the remedie ſhold be had in the chauncerie, in the ſame caſe the ſame inconvenience ſhould followe, as ſhould have doone at the common lawe, that there no ſubpœna ſhall lye. And that it ſhould be ſo in this caſe to all executors is evidente; and therefore no ſubpœna ſhall lie as me ſeemeth. And like lawe is, as I take it, upon an untrue preſentment in a leete for ſuch a thing as toucheth not freehold, that like as there is no remedie at the common lawe to travers it, ſo there ſhall be none by ſubpœna; for the cheif cauſe why the common lawe ſuffereth no travers in this caſe, as I take it, is to eſchewe the greate trouble that might enſewe upon ſuch traverſes, conſideringe the great multitude of ſuch preſentments in all ſheriffs tournes and leets within the realme; and as greate trouble and ſuite wold enſue if a ſubpœna ſhould lie in this caſe as would do by traverſes, and therefore no ſubpœna ſhall lie. And tho' ſome bookes aſſigne another reaſon why there lyeth no traverſe againſt ſuch preſentments, that is to ſaye, becauſe the lawe preſumeth ſoche preſentments, which be made by twelve men, in the ſame place where the offence is ſuppoſed to be, to be true, and will ſuffer the partie to have no traverſe to it, unleſs he put in his traverſe to the preſentment the ſame day, and that if he paſs the day no traverſe ſhall lye for him; and tho' this conſideration may ſeeme ſomewhat to proove that no traverſe ſhall lie againſt ſuch preſentmentes, yet I thinck the moſt principal cauſe thereof is for eſchewing of greate ſuites and unquietnes, that might followe amonge the people, if ſoche travers weare ſuffered. And the lawe moche provideth and forſeeth that no hurte ſhall grow unto a

* But in latter times the judges have allowed actions of *aſſumpſit* in which wager of law is not allowed, for debts on ſimple contract, againſt the original debtor, and conſequently againſt his executors; and ſince this deviation from the rigor of the law, as it was formerly underſtood, it has been determined, that, though in debt on ſimple contract, an executor may abate the action, yet he is at liberty to plead to it, and will be juſtified for ſo doing. Vaugh. 100. and 1. Lev. 200. EDITOR.

multitude,

multitude, and for that conſideration it is, that the lawe will ſuffer no man to enter upon a diſcente, and that by a ſayle in open market the propertie is altered from him that hath righte; and divers other ſoche lawes be ordayned to eſchew miſchiefes from a multitude.

Alſo if a woman coverte enduce hir huſband to ſell her lande, and ſhe taketh the money and converteth it to hir more profit than the lande was, and after of hir own free will maketh an affidavit that if her huſband dye, ſhe ſhall never claime the lande, but ſhall make ſuch furder ſuretie to the buyer as he ſhall deviſe, and thereupon ſhe and her huſband maketh him a feofment; than the huſband dyeth, and ſhe bringeth a *cui in vita* and recovereth the lande; in this caſe the woman is bounde in conſcience to recompence the buyer of money, and of all the charges that he hath ſuſtained by that occaſion, and yet he ſhall have no ſubpœna, ne other remedie to compell hir to it. For the lawe preſumeth, that what is done by the woman coverte is done by the means of her huſband, and againſt that preſumption ſhall lie no ſuite againſt her. And yet in hir own conſcience ſhe is bound to reſtitution.

Alſo if there be two joint tenants of goods, and the one taketh the whole proffit to his owne uſe, the other hath no remedie by ſubpœna nor otherwiſe; and yet he dothe againſt conſcience to take the whole profits, and as he would not be doone unto; but for as moche as they put confidence each in other to occupie jointly together, therefore, tho' one of them breake that confidence, yet the other ſhall have no remedie neither by ſubpœna nor otherwiſe, againſt his owne agreement.

Heereafter followeth a ſhort tytlinge of divers caſes wherein a ſubpœna lyeth not; but the cauſe why it lieth not is not ſhewed, but is left to other that liſte to entrete furder of the matter.

The EIGHTH CHAPTER.

IF a man recover againſte a tenante for term of life or tenaunte in the tayle by falſe verdicte, and entreth by force of the ſame recovery, and after all the jurors dye, ſo that he that loſte the lande is cleerlie without remedie at the common lawe, yet he ſhall have no ſubpœna.

Alſo if a man without tytle recover lande by a defaulte in a *præcipe quòd reddat*, and enter and taketh the profits, and after he againſte whom the recoverie was had bringeth a writ of righte and recovereth the lande without damages as he ſhold do by the lawe; in this caſe, tho' he that firſte recovereth be bound

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in conſcience to reſtore the damages for the time he had the lande, yet the other ſhall have no ſubpœna againſte him to recover them.

Alſo if a man purchaſe an advowſon, and after ſuffereth an uſurpation before any preſentation, and the ſix monthes paſſe; ſo that he hath no remedie by the common lawe to have a writ of wrighte, yet no ſubpœna lyeth for him.

Alſo if the tenaunte for term of life had at the common lawe doone waſte, there had lyen no ſubpœna againſte him, ne yet doth.

Alſo if a man make a leaſe for a term of life, and the tenaunte for term of life dothe waſte, and after ſurrendreth his eſtate to him in reverſion, and he in the reverſion was ignoraunte that the taking of the ſaid ſurrender ſhoulde extincte his action, yet no ſubpœna lyeth in that caſe.

Alſo if a man offende a penall ſtatute by ignorance of the lawe or of the deed, and thereupon is ſued and condemned in the lawe, yet thereupon lyeth no ſubpœna for him.

Alſo if a man's ſervaunte thro' negligence of his maiſter, tho' it be not by his commandemente or aſſente, but for lacke of correction, do offences and treſpaſſe to his neighbour, whereby the maſter is bound in conſcience to make reſtitution if his ſervaunte be not able, yet there lieth no ſubpœna againſte the maſter to compel him to it.

Alſo if a man take lande for term of life, and bindeth himſelf in an obligation that he ſhall leave the ground in as good caſe as he founde it, and after the woodes thereof be deſtroyed by ſodin tempeſte or ſtrange enemies without any defaulte in him; yet he ſhall be condemned at the common lawe by reaſon of his own bonde, and he ſhall alſo be without remedie as for any ſubpœna he ſhall have in that behalfe.

Alſo whan tenantes for term of life before the ſtatute that giveth the *quod ei deforciat* have loſte their landes by defaulte, whereby they weare without remedie at the common lawe, yet there laye no ſubpœna for them in the chauncerie.

Alſo if a man of his meere motion and without any recompence make a leaſe for a term of life, the remainder to the ſheriff of ſoche a ſhire and to his heirs, without naming his ſurname * or his proper name; in this caſe like as the remainder is voyde in lawe, ſo it is in conſcience, and no ſubpœna lyeth thereupon; and yet a feofment to the uſe of the ſheriff of Dale and his heirs without naming his ſurname or proper name, had bin good before this parliament.

Alſo if a man can proove by ſufficient wrightinge, that in the time of king Henry the 2d. an annuitie was granted to his aunceſters, but by reaſon that they had no ſeaſin ſythe that time, he is without remedie at the common lawe; ſo is he alſo without remedye by ſubpœna.

Heereafter

* That is, no name of purchaſe.

Heereafter followeth a ſhort tytlinge of divers things, which it will be righte expedient for the chaunceller of England to have in remembraunce; leaſte happelye if he advertiſe them not, he may charge himſelf in conſcience ſome tyme with the whole thinge that is in demaunde before him, tho' he cannot be compelled thereto becauſe he is a judge of recorde.

The NINTH CHAPTER.

FIRSTE if the chauncellor grante a ſubpœna and taketh no ſuritie that the plaintiff ſhall ſatisfy the party grieved for his damages, if the matter in the bill be not founde true, and after the matter is founde againſte the plaintiff and he is not ſufficiente to yelde damages to the defendaunte, I think, that in that caſe the chaunceller is bounde in conſcience to yield damages himſelf; becauſe he took no ſuritie at the grauntinge of the ſubpœna, as he ſhold have done by reaſon of the ſtatute made in the 15th yeare of king Henry the 6th, the 4th chap. whereby it is enacted, that no ſubpœna ſhall be graunted tyll ſuritie be founde for the truthe *. But if he taketh ſoche ſuritie, that is ſufficient diſcharge for him, tho' the ſurties after decaye and be not able to yielde the damages.

Alſo if a judgment be given in the kinge's courte, and after that judgment the partie ſurmiſing that the judgment was given againſt conſcience prayeth a ſubpœna to have it examined in the chauncerie, and thereupon the chauncellor compelleth the plaintiff to finde ſuretie according to the ſaid ſtatute that he ſhall yielde damages to the party grieved if he cannot proove his bill true, and after it is founde againſt the plaintiff; in this caſe if the plaintiff and his ſureties, for that they be decayed ſurtie taken, be not able to yelde the damages, than the chauncellor is charged in conſcience to pay them. For tho' he have obſerved the lawe in takinge the ſurities, yet by the graunting of the ſubpœna he hath done againſt the ſtatute made in the 4th yeare of Henrye the 4th, whereby it is enacted, that judgments given in the kinge his courtes ſhall not be examined in the chauncerie parliamente nor els wher, but that the parties and their heirs ſhall be in peace till the judgment be reverſed by errour or attaynte if any be; and therefore if the partie

* In Mr. Ruffhead's edition of the ſtatutes, it is obſerved, that chap. 4. of 15. H. 6. is not upon the roll; and therefore it's being a ſtatute ſeems queſtionable. However, lord Coke concurs with the writer of this treatiſe in conſidering it as a ſtatute; nor is it objected to by the learned obſerver on antient ſtatutes. 4. Inſt. 84. Barr. on Ant. Stat. 4th ed. 403. Whether it is a ſtatute or not, it has long been the practice in chancery to iſſue ſubpœnas without taking ſecurity, except in ſome ſpecial caſes, as where the plaintiff reſides or is going abroad, and the defendant on that ground applies to the court to have ſecurity given. Pract. Reg. in Cha. 340. —— EDITOR.

and

and his furtyes be not ſufficient to yielde the damages, the chauncellor, as manye men ſaye, is bounde in conſcience to do it.

Alſo if the chauncellour, eyther from vehemente conjectures or by other information, giveth ſentence without proofs, than he putteth himſelf to this jeopardye, that if afterward it come to his knowledge in more credible manner than the firſte conjectures weare of, that the conjecture were not true, than he is bound in conſcience eyther to redreſs the ſentence or to reſtore the partie to all that he loſte by that ſentence. And therefore it is a moſt ſure way, that eyther he give judgment by proofes or elſe upon his own knowledge, as I ſuppoſe well he may if he knowe ſoothe faſtlye the trothe of his owne knowledge. And here I would put this diverſitie in this matter, that if the chauncellor give judgment according to the proofes, tho' they be untrue, that it ſufficeth for his diſcharge unleſs he knowe the contrarie of his own knowledge. For he hath followed the order of the tryall appointed by the lawe in that caſe, and that ſufficeth to him. As it doth for the ordinarie if he preſente the clerk of him that is founde true patron by the *jure patronatûs*, though he be not ſo indeede; for he hath done that that the lawe wold he ſhold do for knowledge of the trothe therein: but if he will not graunte any writ to enquire *de jure patronatûs*, but will preſent by other examinations and preſumptions the clerck of him that he thincketh to be right patron, he byndeth himſelf to this jeopardie, that if another be righte patron indeede, a *quare impedit* lyeth againſt him. And ſo me thincketh, that the chauncellor likewiſe byndeth himſelfe to yielde damages if he give judgment upon conjectures, though he thincketh never ſo cleerlie in his conſcience that they be true, unleſs they be true indeed. And yet ſome will ſay, that though they be true indeed, that yet he offendeth, becauſe he hath ſet a certaintie of his judgmente in that thinge that is uncertaine, and that is not appointed in the lawe for him to followe for his warrantie; and they thinck he may not do ſo with conſcience; for it is ſayde, *qui amat periculum peribit in illo*, he that will willfully put himſelf in jeopardie to offende ſhall periſh thereby. And though that texte may alſo be reaſonable expounded to other jeopardies, yet it ſeemeth, that it may convenientlie be applied to this purpoſe, that is to ſay, that he putteth himſelf in jeopardie to offende that giveth a judgment and is not in certaine of himſelf nor by the order of the lawe that his judgment is true. And ſo it is, if a man taketh another and ſweareth preciſelie that ſuch a thing is true, which he knoweth not but by conjecture. And I believe their ſaying rather to be true for this reaſon. For I have taken it allwaye for a learninge, that if a man have no ſufficiente proof of his tytle by witneſs in writing or otherwiſe that he is without remedie in the chauncerie;

chauncerie; and if the chauncellor might give judgment upon conjectures, that wear not ſo, for he might then judge as his conſcience judgeth him to do after as he thought to be the moſte reaſonable conjecture. And where ſome men have ſayd, that the chauncellor upon a ſubpœna is not bounde to judge *ſecundum allegata et probata*, but accordinge to the trothe; as I take it, that is to be underſtood in this manner, that, though prooves be brought into the chancery which proove ſufficiently for one of the parties, that if the other partie can ſufficientlie enſtructe the chauncellor that he hath better matter than he pleaded firſt, and that is newlye come to his knowledge, and prayeth that he may be admitted thereto, the chauncelour may admit him to it as well after publiſhinge of witneſſes as before if he will; but that is not to be uſed without a verie ſpecial cauſe, for it is againſte the common forme of the chauncerie. And alſo he may ſuffer the parties to chaunge their demurror, and that is a greate favour; for they ſhall not be admitted thereto in none other courte of the kinge. Alſo in the chauncerie a double plea, ne a departure from his plea, ne two plees wher the one goeth to the whole, ſhall not condem him that pleadeth it; but the verie trothe in conſcience is to be ſearched, and that trothe cannot be ſearched by conjectures as me ſeemeth.

And ſome men ſay, that if the chaunceller grante a ſubpœna upon a bill that appeereth evidentlye to belonge to the common law and not to the chauncerie, and though he there taketh ſurtie accordinge to the ſaid ſtatute of Hen. 6. yet in that caſe he is bounde nevertheleſs to yielde damages to the defendant, though the bill be prooved true; becauſe he hath done againſt the lawe. And ſome men will ſay, that in that caſe an action lieth upon the ſtatute of *Magna Charta* againſt the plaintiff. Howbeit I will not determinately ſpeake therein, but will likewiſe remit it to other that will furder treate thereof for the plainer declaration of that matter.

And I would therein take this diverſitie. If the matter in the bill were apparent and without doubt or argument that it belonged to the common lawe, that than it ſhould ſeeme that the chauncellor ſhold be bounde in conſcience to yielde damages if the partie be not ſufficient, as it is ſayde before. But if the matter in the bill be doubtful whether a ſubpœna lye thereupon or no, and he taking the lawe to be that a ſubpœna ſhould lie in the caſe graunteth forthe a writ, it weare harde to ſay, that he ſhould be bound in conſcience to yielde damages, though it appeered afterward by reaſoning of the judges or otherwiſe that no ſubpœna laye in the caſe. For they that be learned in the lawe may after moſte common opinion be ſome tyme excuſed, though

they

they give council otherwiſe than the lawe is, ſo that they gave counſel as they thought the lawe to bee, and that they had taken ſufficient tyme and ſtudie to learne the lawe, and that ſpecially in ſoche caſes as be verye harde to come to the knowledge of the lawe in. And ſo it ſeemeth to be of the chaunceller in grauntinge of writs of ſubpœna.

Alſo if the chauncellor delaye the parties, eyther in the pleadinge, or in the bringinge in of witneſs, or after the publiſhinge of witneſs, more than he wold be contented to be delayed himſelf if he weare in like caſe, either for favour to any of the parties, or to keepe many ſureties before him, or for ſuche other cauſe like, he is bound in conſcience to reſtore the partie ſo delaied, or happely both parties, of all their coſts and damages that they have ſuſtained by reaſon of that delaie; for he hath done as he wold not be done unto. But if the matter be verie doubtful, and he therefore reſpiteth it, to be adviſed, or to have counſel of the juſtices, or for that he may not attende it for other more neceſſarie cawſes as he thincketh, there he may be excuſed in conſcience. And ſo the entente and cauſe of the delaye is the verie charge or diſcharge of conſcience in this behalf as me ſeemeth.

Heereafter followeth a tytling of divers objections, which the maker of the foreſaide dialogue layeth againſt writs of ſubpœna with anſwers to them.

The TENTH CHAPTER.

FIRSTE he ſayeth, that he marveleth howe the chauncellour may make ſuch a writ to let the king's ſubjects to ſue his lawes, the which the kinge himſelf cannot do righteouſlye, for he is ſworne to the contrarie.—To that it may be anſwered, that the kinge's oathe in that pointe is this, that he ſhall graunte to hold the lawes and cuſtomes of the realme; and than if the lawes and cuſtomes of the realme ſhall be underſtood as well the lawes and cuſtoms uſed in the chauncery as at the common lawe, as I ſuppoſe they be, and as I have ſomewhat touched before in the 5th chap. of this treatiſe that they be, than it is not againſte the kinge's oathe, though the chauncellor by means of a ſubpœna miniſter juſtice unto the ſubjects.

Another

Another objection is this. He ſaith, that the kinge's juſtices and his ſerjauntes be ſworne, to miniſter juſtice unto the kinge's ſubjects, and that ſo is not the chaunceller; whereby it ſhould ſeeme that his meaninge is, that the chauncellor ſhould therefore be at libertie to break juſtice.—To that it may be aunſwered, that though he be not bounde to do juſtice by his oathe, yet he is bounde thereto in conſcience, and that more deeply than the judges be, for he muſte forme his judgments according to the lawe of God or to the lawe of reaſon, or to the lawes of the realme made to determine the righte of landes and goods, and that be not contrarie to the ſaid lawes. And therefore if he erre in his judgment, there is greater defaulta in him than is in the judges if they erre; for the lawe of God and the lawe of reaſon, and alſo the lawe of the realme, grounded upon thoſe lawes, are moche more evident and apparent to give judgment upon, than are the generál groundes maximes and ſome cuſtomes of the realme; for the chancellor ſhall not need to medle with the eſtople of the lawe, ne with the general rules of the lawe, nor yet with the forme of writs ne forme of pleading, wherein the greateſt difficulties of the lawe depende. And peradventure this may be the caſe why a writ of error doth not lye upon a judgment given by the chauncellor upon a ſubpœna; for the lawe preſumeth that no man contrarie to ſo evident lawes will erre in his judgment. But if he do erre indeede, he is as highlie bounde to reforme it or to make reſtitution as the judges of the common lawe be, and more.

Another objection that he maketh is this. In what uncertaintie (ſaithe he) ſhall the kinge's ſubjects ſtande, whan they ſhall be put from the lawe of the relme, and be compelled to be ordered by the diſcretion and conſcience of one man: and namelie, for as moche as conſcience is a thinge of greate uncertaintie, for ſome men (he ſayeth) thincke, that if they treade upon two ſtrawes that lye acroſſe that they offend in conſcience, and that ſome man thincketh that if he lacke money and hath to much that he may take parte of his with conſcience, and ſo divers men divers conſcience; for every man knoweth not what conſcience is as well (ſaithe he) as Mr. Doctour.—And to that he may be aunſwered, that the ſaid two conſciences by him before remembered, whereof the one is a ſcrupulous conſcience and the other an erroneous conſcience, are not ſoche a conſcience as the chauncellor or any other are bounde to followe. But they are errors in conſcience; and errors in conſcience come ſeven manner of waies, as is expreſſed in the ſaid firſt dialogue, the 15th chap. which he that will keep himſelfe in a cleane conſcience muſt cleerlie abjecte and caſte awaie.

But

But the conſcience, which the chauncellour is bounde to followe, is that conſcience, which is grounded upon the lawe of God and the lawe of reaſon and the lawe of the realme not contrary to the ſaid lawe of God and lawe of reaſon. And therefore to be ruled by ſuch a conſcience ſeemeth neyther to be againſt the lawe of God nor the lawe of reaſon, nor the common wealthe of the realme, as in that ſaide treatiſe it is ſuppoſed to be. And that the chauncellor is bounde to order his conſcience after the lawe of God and the lawe of reaſon is evidente of itſelf, and needeth no furder proofe. And that he is alſo bounde ſometime to order his conſcience by the lawe of the realme and after none other lawe of man, it may appeere thus. If a man, ſeized of landes in fee, maketh his will that another ſhall have it to him and his heyres and after dyeth ſeazed; if it come afterwardes in queſtion in the chauncerie, whether this will be good, the chaunceller is bounde in conſcience to judge it to be void in conſcience, becauſe it is voyde by the lawe *. And likewiſe if father and ſoone be, the ſoone purchaſeth landes in fee, and dyeth without any heyres of his body, the uncle by the lawe ſhall have the land as heyre unto him and not his father; but if the father have afterward another ſonne, than that ſonne ſhall have the lande from his uncle as next heyre to his brother; and and if this matter come after in variance in the chauncerie for evidence or otherwiſe, the chauncellor is bounde to order his conſcience and to give his judgment accordinglie as the lawe is. And therefore though no writ of error lye upon a judgment given by the chaunceler upon a ſubpœna, yet it will appeere upon the matter whether the judgmente ſtande with conſcience or not. For it is not to thincke, that whatſoever the chauncellor at the time of his judgment thincketh to ſtande with conſcience ſufficiently diſchargeth him in conſcience; for if there be any error in his conſcience and in his judgment by any of the cauſes contained in the ſaid 15. chap. of the ſaid firſt dialogue, or otherwiſe, he is bounde to reforme it. And that he is bounde to more than any other judge; for other judges may ſome time give judgment againſte their own knowledge, and alſo againſt the trothe, and yet no defaulte to be in them, as it is in all tryalls, excepte death of man where they may not give judgmente againſt their own knowledge; but the chaunceller ſhall never be bounde

* It ſhould be remembered here, that our author wrote before making of the ſtatutes of 32. and 34. and 35. of Hen. 8. from which the power of deviſing land commenced. Indeed before thoſe ſtatutes there was an *indirect* mode of deviſing land through the *medium* of truſts. But it ſeems from our author's doctrine, that this evaſion was only endured where the teſtator previouſly to his will had actually parted with the legal eſtate to a truſtee; and conſequently that the refinement of conſidering the heir as a truſtee was not then eſtabliſhed in our courts of equity. See the preamble to the ſtatute of uſes of 27. H. 8. and the clauſe in it in favor of prior wills, and alſo Dy. 143. EDITOR.

to give judgment againſt his own knowledge, nor againſt that that appeereth evidentlie to ſtande againſt conſcience for no manner of tryall. And tho' ſome men may be deceaved thro' a ſcrupulous conſcience, or an erroneous conſcience, or in ſuche other manner, yet it is not to preſume, that the chaunceller, who is allwaie appointed to his office by the kinge as a man of ſinguler wiſdom and good conſcience, will be deceaved by ſuch errors in conſcience, having ſuch ſtrayte rules to the order of his conſcience as he ſhall have. And ſo me thincketh it is not againſte the common weale of the realme, tho' ſoche caſes as writs of ſubpœna lye upon be committed onlie to the judgment of the chaunceller.

Alſo another objection that he layeth to the Student is this. He ſaithe, that the lawe of the realme is a ſufficient rule to order you and your conſcience what ye ſhall do in every thing, and what ye ſhall not do. If ye therefore followe the lawe trulye, ye cannot do amiſs, nor offende your conſcience, ne ye ſhall not neede to leave the lawe for conſcience: by which ſaying as it ſeemeth that it is in vain in any caſe to ſue by ſubpœna, as tho' a man ſhould never have helpe by conſcience wher he could have none by lawe.—And to this ſaying it may be aunſweared thus, that if he take the lawe of the realme as a lawe grounded upon the lawe of reaſon and the lawe of God with the cuſtomes and maximes of the lawe ordayned by the realme, I thincke well that (as he ſaithe) the lawe of the realme will be a ſufficient rule to order a man and his conſcience what he ſhall do. But yet it will not alwaies give him remedye, whan he hath right, as appeereth in the 2d chap. and the 3d. and alſo the 7th chapter of this preſent booke. And after this lawe it is that the judges reaſon whan they ſet with the chaunceller in the chauncerie, and alſo whan they ſit upon arbitrementes. And if he that made the ſame Treatiſe take the lawe of the realme as a lawe grounded upon the maximes and cuſtomes and the rules of the lawe, and according to the proceſs, as is uſed in the kinge's bench, common place, and ſuch other courtes of record as be commonly taken for courtes of the common lawe, I ſuppoſe that he will not ſaye, that the lawe of the realme ſo taken is ſufficient to order him and his conſcience in all thinges; and if he do, me thincketh he erreth greatlie therein; and that may appear in divers caſes, whereof ſome be put in the ſame 7th chapter, and ſome ſhall hereafter appeare. If an infante of the age of 20 years ſell his lande for 100l. I ſuppoſe alſo he buyeth lande with the ſame money of greater value than his owne lande was: in this caſe by the lawe he may enter again into his own lande; yet the other ſhall have no remedie againſt him by the lawe of the realme for the ſaid 100l. I thincke that no man will ſay that infaunte may with conſcience both retayne the lande and the 100l. alſo; and,

yet

yet the lawe will ſuffer him to do it if he will. Alſo in all caſes wher a man hath righte and is eſtopped by ſome recorde or otherwiſe, ſo that he therefore can have no remedye by the lawe to recover his righte, yet may not he that doth him wronge, retayne that he keepeth wrongfullye from him with conſcience: and yet if he will the lawe will not prohibite him the contrarie, and therefore he muſt ther of neceſſitie be ruled after conſcience if he will be ſaved. Alſo if a man owe another an 100l. and the debtor by ſodeyne loſs on the ſea, or by fire, or ſoche or ſuch other caſualties leeſeth all that he hath, in this caſe the debtee by the lawe may recover his debte, and thereupon take a *capias ad ſatisfaciendum* and laye the debtor in priſon, there to remain till he hath paide the debte, without any help that he ſhall have in the lawe. And yet I ſuppoſe that he that hath made the ſayde Treatiſe will not ſaye, that if the debtee knowe perfectlie that the debtor loſte his goods by ſoche caſualtie, and not through his owne faulte, and that he hath nothing left to pay him with, that he may in conſcience keep him ſtill in priſon; for if he do, I ſuppoſe verilie, he ſaithe as he wold not be done to. And therefore it is good alwaies to uſe the lawe, with a dread that he offende not his conſcience, in executing all that he may do by the general rules thereof, as he may undoubtedlye do, and yet the lawe in itſelfe to be good, as it will appear in the 16th chapter of the ſaide firſt dialouge.

Alſo another objection is this. He ſaithe to the Student, that he mervayleth moche, that the Student will ſay that men that have wronge, may be holpen by a ſubpœna in many caſes, in as moche as he ſaithe there are in *Natura Brevium* ſeveral writs and of divers natures for the reformation of every wronge, that is done or committed contrarie to the lawes of the realme; and in all the *Natura Brevium*, as he ſaith, there is no writ called a ſubpœna, ne yet that the nature thereof is not there declared, as there is of all the writs ſpecified in the ſaide booke: and ſo it ſeemeth that his meaning is, that becauſe a ſubpœna is not in *Natura Brevium*, therefore ther ſhold be no ſuche writ—And this ſhold ſeeme to be but a ſlender objection. For the ſaid booke is not taken of ſuch authoritie, that all things that is in it is cleere lawe, ne that it is not ſo perfecte that all writs that pertaine to the lawe ſhould be contayned therein. And therefore I ſuppoſe that it will be hard to fynde in *Natura Brevium*, wher an action upon the caſe or a writ of forciable entry lye; and ſo I ſuppoſe it will be of divers other actions upon ſtatutes if it weare thoroughly ſearched.

And ſo I thincke, that the ſaide objections be but of ſmall ſtrengthe and of ſmall effecte to proove that a ſubpœna may not lie in ſome caſes.

A

DISCOURSE

CONCERNING THE

COURTS

OF

KING's-BENCH and COMMON-PLEAS.

By LORD CHIEF-JUSTICE HALE.

[This piece is extracted from one of the three volumes of lord Hale's manuſcripts, for the uſe of which the editor has already acknowledged himſelf indebted to Mr. Jekyll. In point of ſubject it connects with the chapter on the court of common-pleas in lord Hale's "Conſiderations touching the Amendment of Laws," before inſerted in this volume.]

CONCERNING THE

COURTS

OF

KING's-BENCH and COMMON-PLEAS.

CAP. I.

Concerning proceſs by capias, *&c.*

AT common law there was proceſs to arreſt the body of the defendant in theſe caſes:

In treſpaſs *vi et armis*,

In the king's caſe for his debts,

In pleas of the crown,

In caſe of deceits or contempts committed to the king's courts, which is farther inforced by the ſtatute of Weſtminſter 1. cap. 29.

But there was no proceſs of *capias* to impriſon the defendant in debt, detinue, covenant, or annuity, but ſummons attachment and diſtreſs; nor in actions upon the caſe, but only *pone per vadium*, or attachment and diſtreſs. The firſt ſtatutes, that gave proceſs of *capias* in thoſe actions, were theſe:

In accompt Marlbridge cap. 23. Weſton. 2. cap. 11.

In debt and detinue 25. E. 3. ſt. 5. cap. 17.

In treſpaſs upon the ſtatute of 5. R. 2. annuity and covenant 23. H. 8. c. 14.

In actions upon the caſe in the king's-bench or common-pleas 19. H. 7. c. 9.

Neither could the courts iſſue *capias* at diſcretion, but where either the common law or acts of parliament or the immemorial cuſtom of the court allowed it.

H. 8.

H. 8. *E.* 3. *Rot.* 23. *B. R.* a writ in the king's-bench of *venire facias ipſum* at the king's ſuit in a caſe of a treſpaſs challenged, becauſe *contra communem legem et contra formam in cancellariâ uſitatam*, but that he be proceeded againſt *per attachiamentum et diſtrictiones ubi dilationes habere poſſit, prout moris eſt.* No judgement given, but a *ſuperſedeas* iſſued.

CAP. II.

Touching original writs and writs by original.

ORIGINAL writs iſſue out of the chancery returnable into the king's-bench or common-pleas.

The writs returnable into the common-pleas are generally all original writs, as well in real as perſonal actions.

The writs returnable into the king's-bench are,

1. Aſſiſes of novel diſſeiſin in the ſame county where the bench ſits.

2. Writs, that ſuppoſe a perſonal wrong or force, as treſpaſs *vi et armis*, *ejectione cuſtodiæ*, raviſhment of ward, *ejectione firmæ*, *vidaicâ*.

3. All writs or ſuits for the king, whether real perſonal or mixt, as writs of right.

4. Writs of *quare impedit*, *quare non admiſſit*, *&c. T.* 19. *E.* 3. *B. R. Rot.* 56. Crompt. Jur. Courts 71. though ſome books are contrary; therefore this hath been ordinarily in the common-pleas.

5. Writs of replevin.

6. Actions of conſpiracy, actions upon the caſe 19. H. 7. cap. 9. and regularly all writs in perſonal actions, except debt, detinue, covenant, account. Some inſtances have been of writs of annuity there brought. *H.* 47. *E.* 3. *Rot.* 18. *Eboracum.*

Of original writs, ſome are fineable and pay a fine to the king; as all real actions, aſſiſes, covenant to levy fine; and perſonal actions, as in debt, where beſides the charge of the writ which is 6s. 8d. there is paid unto the hanaper for every demand of forty pounds 6s. 8d. and if above forty pounds and under 100 marks 6s. 8d. more, and ſo for every 100 marks 6s. 8d. *F. N. B.* 96. and and in the like proportion in treſpaſs, treſpaſs upon caſe, and covenant, where the damages exceed.

Theſe fines in perſonal actions are divided, one moiety to the curſitors, the other moiety to the lord keeper and maſter of the rolls.

CAP.

CAP. III.

Concerning the jurisdiction of the king's-bench in general.

THE matter of the jurisdiction of the king's-bench may be distinguished into *pleas of the crown* and *civil pleas*.

Pleas of the crown are very many and various; as indictments originally taken in the county where they sit, or removed thither by appeals by writ or bill, *certiorari*, &c. *mandamus* for officers, *habeas corpus* for persons committed for criminal causes. Those belong to the king's-bench exclusive of the common-pleas.

Except *habeas corpus*, wherein partly by the statute of 16. Car. 1. and in some cases also upon a privileged person committed, they may judge of the insufficiency of the return, and discharge or remand him.

And except informations upon penal statutes, wherein the common-pleas hath ordinarily a concurrent jurisdiction.

Civil pleas on the suit of the party; and they are of several sorts:

1. Trialls and judgments of causes depending in chancery; either by *travers*, *monstrans de droit*, petition, *scire facias*; or by attachment of privilege or suit against a privileged person in chancery, wherein issue being joined in chancery it is sent into the king's-bench to be tryed.

2. *Scire facias* to execute fines or judgments in other courts, removed into chancery, and sent by *mittimus* into the king's-bench to be proceeded upon to execution.

3. Writs of error upon judgments given, not only in the common bench, but in all other inferior courts of record, as judges of assise, corporation courts; wherein though anciently opinion was, that they were returnable in the common-pleas as well as king's-bench, F. N. B. 20. yet, now the law and practice is settled for the king's-bench. Pasc. 26. El. B. R. Crook n. 6. Roe and Hartly, Dy. 250. and P. 29. El. B. R. Mortun's case.

4. Suites between party and party originally commenced there, *de quibus infra*.

CAP.

CAP. IV.

Concerning original ſuits between party and party; and firſt touching ſuits by original writ.

ORIGINAL ſuits in the king's-bench are of two ſorts, either by original writ out of the chancery, or by bill.

Suits by original writ there are of three kinds:

1. Such as cannot at all be there held by original, as all real and mixt actions (except aſſiſe, *ejectione firmæ*, *ejectione cuſtodiæ*) and thoſe four kinds of perſonal actions, debt, detinue, accompt, and covenant.

For theſe are *communia placita* within the ſtatute of *Magna Carta*, *cap.* 11. and cannot be held by writ in the king's-bench, but muſt be in the common-pleas.

2. Such as may be held by original writ in the king's-bench, and cannot be held otherwiſe.

Such are all writs of error, wherein they cannot proceed but by original.

And ſo it ſeems alſo upon the ſtatute of hue and cry. Accord. 37. El. Sadler and Morſe; though 7. Car. B. R. in Heliar's caſe there was a proceeding againſt the heirs *hundredi in cuſtodiâ mareſcalli*, but no exception taken to it. So in *replevin*, *recordari*, and aſſiſe, they cannot proceed but by writ.

3. Such as they may proceed in by original, but yet may likewiſe, if the plaintiff pleaſe, proceed by bill. Such are generally all actions of *ejectione firmæ*, *ejectione cuſtodiæ*, and regularly all perſonal actions except the four above excepted.

The original ſuits in the king's-bench without original writ are thoſe ſuits by bill, *de quibus cap. prox.*

CAP. V.

Touching ſuites in the king's-bench by bill.

ORIGINAL ſuites in the king's-bench by bill are of two kinds, viz. original ſuites by bills at large, or ſuites by bill *ratione privilegii.*

Suites by bill at large were anciently practiſed in this court, but have been long diſuſed for the reaſons hereafter given.

Theſe ſuites were for the moſt part for contempts deceits and treſpaſſes upon the caſe, whether the ſame were committed in the ſame county where the courts ſat, or in other counties. And the courſe was, 1. For the party to enter his plaint or bill. 2. Thereupon he had the like proceſs as was natural in ſuch ſuit, had it been there by original; viz. if in treſpaſs, attachment or *pone per vadios* and *capias*; if in action upon the caſe, where no proceſs by *capias* lay till 19. H. 7. then by *pone per vadios* and diſtreſs, till that ſtatute came.

Inſtances of ſuch ſuites by bill original were frequent in ancient time.

T. 6. *E.* 3. *Rot.* 30. *Eboracum.* Attachment by bill *ſine brevi ad reſpondendum tam regi quàm parti* for a contempt committed in the county where the king's-bench ſat. Nota, ſuits per bill in B. R. for conſpiracies

3 Aſs. 15. *et pur choſe touchant le roy.* 17. Aſs. 5.

P. 11. *E.* 3. *Rot.* 74. *Norf.* a ſuit by John Hened *per billam* for a treſpaſs in a forren county, and the defendants *attachiati fuerunt.* *Aſſault in auter county vers un, que ad ſuit*

in B. R. 31. E. 3. bill 11.

T. 15. *E.* 3. *Rot.* 126. *Ricardus Fowler attachiatus per billam ad reſpondendum in placito tranſgreſſionis.* In C. B. ou B R. for maintenance done

in curiâ; aliter per origin 22. *H.* 6. 24.

M. 30. *E.* 3. 113. *B. R. London. attach. per billam ad reſpondendum regi et parti* for an aſſault committed upon him in London when he came to proſecute a ſuit in *B. R.* *Pro rege et parte* for aſſault on coming *ad curiam tiel*

autre county 30. Aſs. 14.

P. 41. *E.* 3. *Rot.* 56. *Staff.* John Bottetourt impleaded *per billam* for a forren treſpaſs. *Vers officer ſur eſcape.* 42. Aſs. Ed. 4. 2.

H. 49. *E.* 3. *B. R. Rot.* 4. *Linc.* proces *per* attachement *per billam verſus vicecomitem* directed *al coroner* for the diſturbing a lord of a liberty. In B. R. in treſp. *de battery* cloſe-b-u-

ſer *ou faux impriſonment.* 22. Aſs. 83. 85. 86. 87.

Many

Many more inſtances of this kind probably may be; and regularly, where they did not proceed by original (as it is plain they anciently did in moſt caſes) their uſual proceeding was by ſuch original bill, and not as now by a general bill of Middleſex *in placito tranſgreſſionis*, or a *latitat*, which ſuppoſeth a bill of Middleſex *in placito tranſgreſſionis*, which ſeems not to be ſo ancient a practice.

Now touching theſe original bills in the king's-bench, theſe things are obſervable:

1. Regularly bill was filed before any proceſs made.
2. The proceſs was purſuant to the courſe of law, in caſe the ſuit had been by original; viz. in actions upon the caſe and treſpaſs the firſt proceſs was a *pone per vadios* or an attachment.
3. The writ or proceſs was ſpecial according to the nature of the bill, as it is or ſhould be where the ſuit was by original.
4. This bill lay not for any ſuch cauſe, wherein an original writ lay not in the king's-bench; and therefore was not in debt, detinue, account, or covenant.
5. They were not frequent; becauſe original writs of theſe kinds were frequently returnable into the king's-bench.
6. They have been long diſuſed upon many probable reaſons; viz. firſt, becauſe they diminiſhed the revenue and profits of the fines or fineable writs; ſecondly, becauſe there was a more expeditious way in proceſs of time practiſed, by bringing the party into the *cuſtodia mareſcalli*, and then declaring againſt him in any action; *de quo infrà*.

The ſecond ſorts of ſuits by bill were *ratione privilegii*; whereof in the next chapter.

CAP. VI.

Concerning ſuites by bill in the king's-bench ratione privilegii.

THE proceeding by bill *ratione privilegii* extends not only to thoſe actions where the king's-bench may hold plea by writ or plaint, as *ejectione firmæ*, treſpaſs and actions upon the caſe; but alſo to all other perſonal actions, which otherwiſe are not regularly within their cognizance, as debt, detinue, account, covenant.

This privilege is of three kinds. 1. *Privilegium ex parte querentis.* 2. *Privilegium ex parte defendentis.* 3. *Privilegium ex parte curiæ*, though it is alſo a privilege of the defendants.

1. The

1. The privilege *ex parte querentis* is, that any officer or clerk of the courts may ſue by bill or attachment of privilege.

2. The privilege *ex parte defendentis* is, that every officer of the court may be ſued by bill *tanquam præſens in curiâ*, and be fore-judged if he appear not.

[Theſe two ſorts of privileges are common to all the four courts of Weſtminſter, who hold plea by bill in all theſe caſes.]

3. The privilege *ratione loci* is, when a defendant is in the cuſtody of the marſhall of this court, he is ſuable here by bill in any action perſonal (as before) *in cuſtodiâ mareſcalli.* But in the ſame county ſuit by bill lyes, though not in *cuſtod. mar.* Dyer 118.

And tho' the defendant be let to bail, yet he is as to this intent *in cuſtodiâ mareſcalli*; for they are his ſpecial keepers appointed by the conſent of the court, 31. H. 6. 10. *mes aliter de mainpriſe de die in diem.* 9. E. 4. 2. Though the commitment be upon ſurety of the peace, and preſently after commitment diſcharged. 7. H. 6. 39 *A*. 42.

And this kind of privilege is ſomewhat of the ſame kind with an accomptant, who is entered into his accompt in the exchequer. He is ſuable there by bill in any perſonal action; becauſe he is preſent in court. And ſo he that is *in cuſtodiâ mareſcalli*, is preſent in court, and out of the power of the ſheriff to be arreſted; and therefore they may declare againſt him *in cuſtodiâ mareſcalli.* *Ou per erroneous proceſs al.* 27. H. 6. 5. 6. *Et nota* bill *in cuſtodiâ mar. de præmunire done per ſtat.* 2. R. 3. 17. 27. H. 6. 5.

But the bare prevention of a failure of juſtice is not a ſufficient reaſon for it; for tho' the ſheriff cannot arreſt him while he is *in cuſtodiâ mareſcalli*, yet they may arreſt him when he is bailed; and tho' the ſheriff cannot arreſt him to bring him to anſwer in another court when he is actually the marſhal's priſoner, yet he may be removed into the court of common-pleas by *habeas corpus*, and charged with an action, and committed to the Fleet, with his cauſes. Bill *ver. un in cuſtodiâ mareſcal*, 1. R. 2. Bill. 9.

The true reaſon therefore of this privilege is,

1. Becauſe the party is preſent in court.

2. And principally, becauſe by long cuſtom and uſage the court of king's-bench hath enjoyed this privilege, and ſo it is become the law of the land, and is not alterable without an act of parliament. Cook. Juriſd. Courts 12. 31. H. 6. 10.

And although anciently the greateſt part of civil ſuites in the king's bench were by original writ, or thoſe original bills mentioned cap. 5. yet now and for many years the great buſineſs of civil actions between party and party is tranſacted in that court by this means of declaring againſt perſons *in cuſtodiâ mareſcalli.*

The

The means of making this practical in all cases is this:

If the defendant be in Middlesex or other county where the king's bench sits, the plaintiff takes out a bill of Midddlesex *in placito transgressionis*, which is questionless within the power of the court to proceed upon. But if he be not in that, but some other county, then he takes out a *latitat* into that other county, which always supposeth a bill of Middlesex as its original. And both these process are certainly very ancient and warrantable process in this action.

When the party is taken upon either of these process, he is either committed to the marshal or bailed.

And if he be committed the plaintiff need not, or at least useth not, to proceed for trespass the matter of the first writ; but may declare against him in any personal action by the privilege of the court before mentioned; and so may any person else. If he be bailed, yet he is still, as to this privilege of being sued, *in custodiâ mareſcalli*; and by the course of that court such bail given makes both him and his bail liable to any action commenced against him by the same plaintiff in the first and second term of the return of the process; and though the bail be not liable to the suit of a stranger, yet this bail given is an appearance to any suit commenced the first term wherein the bail is given or the next term after. And as the party plaintiff may revive his former action of trespass, and declare in any other action; so if there be four defendants in a *latitat* or bill of Middlesex, the plaintiff is not bound to prosecute jointly against them, but may declare in several actions against the several prisoners. For the process of the bill of Middlesex or *latitat* is by custom used but as a common method or process to bring the party *in custodiâ mareſcalli* to declare against him in any other action.

And as this is the order or method of bringing the defendant within the reach of this privilege; so the usefulness of this method of proceeding to the plaintiff is apparent.

1. He payes no fine upon the process to the king.

2. The process is cheap, the bill of Middlesex costing but 2s. 6d. the *latitat* but 5s. 1d.

3. The plaintiff hath the advantage of time to form his suit, as his case requires; and is not bound to any concordance with any original writ or process. Variance hurts not.

4. He payes no costs, unless the defendant appear in person, upon the construction that hath been put upon the statute of 8. Eliz. cap. 2.

5. The bail is liable to any action of the plaintiff's the first or second term.

6. He may upon one joint writ declare severally against each defendant. By meanes of this and some other advantages the

the court of king's-bench hath drawn the practice from the court of common-pleas; as well in thoſe perſonal actions of debt, detinue, covenant, and account, which ſeem peculiar to the common-pleas, as in moſt other perſonal actions which were common to both courts, as treſpaſs, actions upon the caſe.

CAP. VII.

Touching the relief, practiſed by the court of common-pleas, to help themſelves againſt the advantages of the court of king's-bench.

THE court of common-pleas, finding, that, by the means aforeſaid and ſome other advantages, the king's-bench had drawn the practice from the common-pleas, endeavoured ſome reliefs therein.

To anſwer the advantages of the *latitat* and bills of Middleſex, the court of common pleas uſed the help of a writ out of the chancery *quare clauſum fregit*, wherein they ſometimes joyned two, three, or four defendants.—The defendants thereupon appearing, they took bail of them to anſwer a new original, which the plaintiff ſhould purchaſe within terms. Thereupon the plaintiff procured one or more new originals againſt all the defendants, or ſome of them ſeverally, in treſpaſs, action upon the caſe, or otherwiſe as his caſe required, and lately alſo in debt.

This practice, tho' but new and ſcarce warrantable, did them ſome help; for,—1. They had time to think of their declarations and writs, and to form them as their caſe required.—2. This writ was cheaper than the *latitat*, and no fine paid upon it; for whereas the bill of Middleſex was 2s. 6d. the *latitat* 5s. 1d. this writ coſt but —Again 3. They did uſe to put three or four in a writ; and if occaſion were took out ſeveral originals.

But yet this did not cure all the matter. For—1. tho' in the common-pleas they avoided payment of a fine upon the firſt proceſs, yet upon their new originall they were forced to pay a fine as before, and ſo upon the long run the charge in the common-pleas was as much as before.—2. The king's-bench had ſtill this advantage, that their bail laid the defendant and his bail upon and liable to all the plaints which he ſhould proſecute before the end of the ſecond term; and beſides rendered the defendant to be ſubject to actions of ſtrangers within thoſe two firſt terms.

And therefore ſtill the practice going where the plaintiffs found moſt advantage, and the king's-bench carrying the practice from the common-pleas, a ſecond expedient was found.

By

By the ſtat. 13. Car. 2. ſt. 2. cap. 2. it is provided, that in proceſs wherein the cauſe of action is not expreſſed, the ſheriff ſhould take only a bond of 40l. for appearance to be entered, and thereupon amercements to ſtay.

This rendered the *latitat* and *clauſum fregit* both inſignificant; for, men being fond of good bail to their actions, of which by this act they were in effect ouſted, and the writs upon originals being ſpecial, the common-pleas had much the advantage by their ſpecial writs to have ſpecial bail; and the practice began to run thither, eſpecially in actions of debt and treſpaſs and actions upon the caſe, where if the debt or damages exceed 20l. they have ordinarily ſpecial bail in both courts; and ſo by this means the common-pleas relieved themſelves in a great meaſure againſt the exceſs of practice in the king's-bench.

CAP. VIII.

Concerning the expedient uſed by the court of king's-bench to accord this laſt difficulty.

THE court of king's-bench, upon the difficulty put upon them by this act, added a clauſe in the latter end of their bills of Middleſex and *latitats* (which ever was a *reſpondendum in placito trangreſſionis) ac etiam ad reſpondendum in placito debiti de* 200*l.* or *in placito tranſgreſſionis ſuper caſum ad damnum* 200*l.* and ſo for any other action: and by this means they ſuppoſed the intent of the ſtatute anſwered, and the convenience of ſpecial bail reſtored again, and thereby the court of comm. pleas under the ſame if not a greater miſchief than before.

How far forth this may be juſtifiable by law in thoſe actions, wherein the king's-bench might hold plea by original writ or original bill without the aid of the privilege of *cuſtodiâ mareſcalli*, may be conſiderable.

But it may be very difficult to juſtify it as to theſe actions, of which the king's bench could not hold plea by originall, as debt detinue accompt and covenant; for theſe are reſtrained to the common-pleas by the ſtatute of *Magna Carta*, and were not to be pleaded in the king's-bench but by privilege, when the party was in *cuſtodiâ mareſcalli*; and therefore it were hard to make out a proceſs, that ſhould charge the party with thoſe actions before he were a priſoner of that court.

The

The conclusion upon the whole business is but shortly this:

If those writs shall take place to answer the statute of 13. Car. 2. then is the court of common-pleas in effect destroyed; for now their *clausum fregit* is rendered ineffectual, and cannot be pieced up to hold pace with the bill of Middlesex and *latitat* thus amended.

If those writs shall not be thought either legal or to answer the statute of 13. Car. 2. then is the greatest part of the practice of the king's-bench lost: whereby, as in the former case, the ancient court of common law shall be in effect rendered useless; so, in the latter case, the court of king's-bench, the great nursery of the professors of the law, shall become maimed.

At present therefore laying by this consideration, I shall enquire, what other advantages either court hath of the other, and how they stand ballanced.

CAP. IX.

Concerning the mutual ballancing of either of those courts with the other.

THE king's-bench, as peculiar to itself, hath pleas of the crown, writt of error, trial upon issues joined in the petty bag.

The common-pleas, as peculiar to itself, hath fines and recoveries, and actions of waste and real actions, which are very seldom, and process to the outlawry in debt, detinue, account, and covenant.

And hitherto the courts seem to ballance each other.

But then, in relation to pleas between party and party, the king's-bench hath certain peculiar advantages; whereby it will get ground of the common-pleas, tho' the forementioned difficulty were settled. For instance,

1. The process and continuances in the king's-bench are *de die in diem*, which renders them expeditious. But the process and continuance in the common-pleas is to common days, and in many cases to great distance between their returns; which though it be in part helped by the stat. 13. Car. 2. cap. 2. yet the help is not large enough.

2. There are no costs given upon *latitats*, unless the defendant appear in person *; which gives great encouragement to vexatious plaintiffs, and multiplies suits in that court by reason of the plaintiff's great advantage over the defendant.

* See 8. Eliz. c. 2. s. 2.——EDITOR.

3. The plaintiff, paying no more for a proceſs with *ac etiam* of 1000l. than of 20l. plaintiffs have great encouragement to be vexatious, and unreaſonably to oppreſs a defendant: which cannot be ſo in the common-pleas; becauſe the plaintiff payes his vexation upon fineable writs.

4. The bail in the king's-bench is liable to all the actions of the plaintiff, which he delivers within the firſt two terms; which, as it is unreaſonable and inconvenient to the ſubject, and fit to be reformed, ſo it greatly drawes ſuites from the common pleas, where their bail is in a ſum certain and to anſwer particular actions.

5. Actions upon the caſe upon ſpecial promiſes, being now the greateſt part of ſuits, wherein the declaration original and proceſs ought to agree, lace them of the common-pleas ſtrictly up both to ſettle and draw their original and accord with it; whereas, in the king's-bench, their proceſs being general, they may form and mould their declaration before the entry of the iſſue or demurrer, as they pleaſe, and as their matter will bear, which is a great advantage in point of practice.

6. They have no imparlance roll in the king's-bench; and all their pleadings are in paper, till the record entered upon iſſue or demurrer; which muſt expedite their buſineſs, and enables their amendments of miſtakes before entry. But in the common-pleas their *recordatur* of pleas and their imparlances multiply charges; in which the protonotarys at preſent impoveriſh the court and make errors.

7. Their repetition of originals in writs and declarations, and their common bar in the common-pleas, make proceedings chargeable, being above ſeven times tranſcribed and paid for; none of which are in the king's-bench.

8. In the common-pleas there are three protonotaries, in the king's-bench but one; in the common-pleas they have multitudes of attornies, in the king's-bench not ſo many; in the common-pleas, there is the ancient uſe of writing ſitting clerks, who may, as there ſhall be occaſion, be ready at any time to give the court an account of the buſineſs of the court, while the attornies are buſy about getting clients in the country.—Theſe will neceſſarily deſtroy that court.

Theſe be ſome of thoſe conſiderable advantages, that the king's-bench has over the common-pleas.

CAP.

CAP. X.

The conſideration of thoſe expedients, that may bring an equality to either court, in thoſe civil pleas, wherein they have a common juriſdiction.

IT is apparently neceſſary, that both courts ſhould have the cognizance of thoſe civil pleas that are common to both at this day.

1. In reſpect of the people, it is fit there ſhould be *electio fori*, and that all perſons ſhould not be neceſſitated to one court; for it may occaſion much inconvenience.

2. In reſpect of the courts themſelves, neither of them ſhould be deprived of what they uſually have had, conſidering the many dependant offices that either court hath.

3. In reſpect of the education and practice of the law, the king's-bench is the nurſery of young profeſſors, without which the elder ſtore would ſoon be exhauſted; and the common-pleas the place of practice of ſerjeants, who ſhould not be diſcouraged.

The wayes therefore to compaſs that end muſt be by ſetting an equality—1. Of cheapneſs or charge.—2. Of expedition or delay.—3. Of accommodation of both courts to the ends of their inſtitution, the indifferent equal adminiſtration of juſtice to the king's ſubjects.

The great obſtacle will be the concerns and intereſts of officers which muſt ſuffer in either or both courts, if any good be done in this kind.

Some of the diſparities in the laſt precedent chapter may be remedied by one or both courts, others not without act of parliament; which is obvious to any that conſiders them.

I ſhall therefore apply myſelf to that which is of moſt concernment at preſent; namely, the rectifying of that diſparity between the courts in relation to original writs *latitats* and bail.

CAP. XI.

Concerning the ſeveral propoſals, that may be made, for the equability of each of theſe courts, in relation to ſuites within the cognizance of both.

FIRST PROPOSAL.

THE firſt propoſal may be, that the proceedings in the king's-bench may be by original writ out of the chancery, and no more by *latitat* and bill of Middleſex; and that, conſidering the great increaſe of original writs and fines thereupon, the fines upon originals may be abated to ſuch a medium-rate, as may neither exceed nor much abate the preſent revenue; and to that end, that a medium be made upon the computation of original writs and *latitats*, whereupon there is an appearance, to proportion the ſame.

The difficulties herein are theſe,

1. This cannot be without act of parliament; and it will be expected to begin with the commons, becauſe it concerns a charge upon the people.

2. It will very much alter the practice of that court, which hath been long uſed.

3. It is to be doubted, whether the preſent conſtitution of the officers of the court of king's-bench be accommodated to ſuch a change, as filazers, *cuſtos brevium*, protonotaries, &c.

4. It will quite deſtroy ſome offices in the king's-bench; and very much impair the revenue of others, eſpecially Henley's office *.

5. It will take away the moſt conſiderable caſual revenue of the chief juſtice and judges of the king's-bench.

6. It muſt take away the king's fines upon judgments given formed by Henley.

SECOND PROPOSAL.

The ſecond propoſal conſiſts of ſeveral particulars.

(1.) The king's-bench to retain their liberty of proceeding by originall in ſuch actions, where by law they may now proceed, viz. in mixt actions *vi et armis*, and all perſonal actions except the four above-mentioned.

* Mr Henley's office was probably that of chief clerk of the king's-bench on the plea-ſide.——EDITOR.

(2.) The

(2.) The king's-bench to proceed in actions by bill, as now they do, only with theſe enſuing variations and additions; the moſt of which require nevertheleſs an act of parliament for their eſtabliſhment in the method propounded.

1. That they may proceed by *latitat* and bill of Middleſex, as now, in any mixt action *vi et armis*, or any perſonal action whatſoever.

2. But then the bill of Middleſex to be ſpecial according to the nature of the action, without the *ac etiam*; as *ad reſpondendum in placito tranſgreſſionis ſuper aſſumpſit ad damnum*, or *in placito tranſgreſſionis ſuper caſum ſur trover*, or *ſupra conſpiratione*, or *ſupra deceptione, ad damnum*, or *in placito debiti, compoti, conventionis fractæ*, &c. *ad damnum*; and the *latitat* purſuant thereunto.

This will have theſe advantages:

1. It will anſwer the ſtat. of 13. Car. 2.

2. It will aſcertain the defendant of the true cauſe of ſuit againſt him, that he may be provided to make his defence accordingly.

3. It will make proceſs regular, and unqueſtionably warrantable.

3. That in all ſuch caſes, where the actions (were it by original) were fineable, the plaintiff to pay a half fine or ſome ſuch proportion, as, upon a conſideration of a medium of fines upon originalls and bills of Middleſex or *latitats*, may make the king compenſation for the half fine abated upon originalls.

4. That the defendant appearing put in common bail or ſpecial bail as the caſe requires, or in default thereof be committed to the marſhall.

5. The defendant appearing, though not in perſon, and filing a common bail or ſpecial bail, as the caſe requires, the plaintiff to declare againſt him according to the original proceſs, or in default thereof to have coſts by the ſtat. 8. Eliz.

6. The defendant having found ſpecial bail, this bail to be chargeable only to the action whereupon arreſted, but to be an appearance to any declaration *by the by* for the ſame or any other plaintiff the ſame term.

7. Upon ſuch declarations *by the by* no ſpecial bail to be given, unleſs the defendant be actually *in cuſtodiâ mareſcalli* and deſires his liberty, and then ſpecial or common bail to be as the caſe requires.

8. Upon all declarations *by the by*, either by the ſame or any other plaintiff, the half fine to be paid.

9. The half fine upon the judgment to be diſcharged, becauſe anſwered upon the firſt proceſs or declaration.

The

The half fine upon the judgment falling, which is in farme, the farme to be abated. Conſideration to be had,

Of the king for his farm;

Of the farmer *pro proficuo.*

10. The fines upon proceſs and declaration to be diſtributed in the ſame manner, as the whole fines are upon writs returnable in C. B.

11. Care to reduce the rates of bills of Middleſex or *latitat* (where original) to be as cheap in their charge of making and ſeal as the like originals. But then to be conſidered, how the judges and officers ſhall be reimburſed for what they loſe,

1. By ſinking of proceſs of *latitat.*

2. By ſinking their number, which will neceſſarily enſue by this method.

12. To conſider, where, and to whom, and how, thoſe fines upon firſt proceſs and declaration ſhall be firſt paid and accounted for.

13. But when all is done, if the original writs in action *ſur caſe* ſhall be ſpecial, as now they are, the common-pleas will be at theſe diſadvantages:

1. Their writs will be more chargeable according to their , whether ſerviceable or not.

2. They will be laced up with a ſpecial original, from which they muſt not vary in proceſs or declaration; when poſſibly upon advice with counſel there will be a neceſſity of alteration, though not in the nature, yet in the ſpecial form or circumſtances of the action.

Therefore it ſeems neceſſary to abridge the forms of writs in action upon the caſe, by ſhortly expreſſing the nature of the action, as in above declared walking bills of Middleſex.

THIRD PROPOSAL.

The third propoſal is, that fines upon original writs in perſonal actions be taken away.

The difficulties herein are theſe:

1. That will deſtroy an ancient revenue of the crown without a compenſation.

2. And though thoſe fines are now divided, as before, between the keeper of the ſeal, maſter of the rolls, and curſitors;

tors; yet they are the reward of their ſervice, and if not ſupplied this way the king muſt ſupply it another way.

3. Neither will this alone ſet the courts upon an equal foot: for the cheapneſs and eaſineſs and convenience of the *latitat* and bail in the king's-bench will ſtill get ground of the common-pleas.

FOURTH PROPOSAL.

The fourth propoſal is, that fines upon original writ be abated to ſuch a proportion and fine ſet upon the firſt proceſs by bill of Middleſex or *latitat*, as upon a medium may countervaile the rate paid upon originals; and theſe fines to be diſtributed between the ſaid keeper, maſter of the rolls, and curſitors, as now fines upon originals are. As if for example upon a medium calculation the originals were ſixty and the fines of them roſe to 60l. and the *latitats* were one hundred and twenty, then the charge upon originals and *latitats* to be brought to a third part of the preſent fines upon originals, which would amount to the ſame rate, viz. 60l.

This though it ſeem the moſt probable of the three, yet hath theſe difficulties.

1. Men are not bound to file an original before the iſſue or exigend, and yet take out proceſs of *capias* in the common-pleas, and the buſineſs compounded. It will be no more reaſon, therefore, to charge the firſt proceſs with the fine; for poſſibly the parties may agree.

2. The form of the writ of *latitat* muſt be mended by act of parliament, and ſo muſt alſo the declaring *by the by* upon a perſon *in cuſtodiâ mareſcalli*: otherwiſe it can neither be known when the writ is fineable, and declarations *by the by* will be without fine. Alſo the baile muſt not be liable to a ſecond declaration, nor be an apparance to a ſtranger: otherwiſe the diſeaſe will remain ſtill.

3. It is very fit to conſider, whether the inhancing of the rates of going to law in the king's-bench will be allowed by parliament, though it abate the charge in the common bench; and whether, when both courts are chargeable, the new-erected courts at Stepney Southwark London and the Marſhalſea will not thereby grow larger by their cheapneſs, which are now in ſome meaſure ballanced by the cheapneſs of proceedings in B. R.

FIFTH

FIFTH PROPOSAL.

The fifth propoſal is, ſince the great difference ariſeth merely upon the account of ſpecial bail, whether there might not be ſome ſuch expedient thought of, as might take away that difficulty.

I muſt confeſs I never underſtood, that ſpecial bail was of any conſiderable convenience to the ſubject, conſidering the trouble expence delay and incumbrance that it occaſions. I do think it were better for both, that a warrant of an apparance ſhould be ſubſcribed by the priſoner in the preſence of ſome attorney, and not to be countermanded. But this the preſent apprehenſion of creditors will not digeſt; and if it ſhould be enacted, it muſt be from a time to come.

But it ſhould be enacted, that if any man ſhould by his writ or declaration demand dett or damages, and ſhould not recover, the defendant ſhould have his full coſts and damages for his impriſonment; and that if he ſhould recover, if he layes in his writ or declaration 10l. more debt or damages than he recovers, he ſhould have no coſts; and that pledges be really given *de proſequendo*: and then there would be very little trouble about ſpecial bail, but when there is real cauſe for it. But whatever be done in this kind, yet certainly the writ of *latitat* or bill of Middleſex muſt be ſpecial in the body of the writ, and that ſettled by act of parliament, and not with a in the writ of an *ac etiam*, which is very incongruous.

A

DISCOURSE

AGAINST THE

JURISDICTION

OF THE

KING'S-BENCH

OVER

WALES,

BY

PROCESS OF *LATITAT*.

[The manuſcript, from which this Diſcourſe is printed, fell accidentally into the editor's hands. He purchaſed it at a bookſeller's on barely reading enough of the contents to ſee that the ſubject was intereſting; and it was an agreeable ſurpriſe to him afterwards, when on a careful peruſal he found himſelf poſſeſſed of an argument, which appeared to him to have very great merit, and to be in a ſtate fit for publication. The editor is not aware, at preſent, who was the author of the argument. But the contents ſhew, that it was written about the year 1745. As to the title of the argument, it is the editor's, the manuſcript itſelf being without one.]

This was written by Lord Camden
See "Reminiscences" by Charles Butler P.

A

DISCOURSE

AGAINST THE

JURISDICTION

OF THE

KING'S-BENCH OVER WALES,

BY

PROCESS OF *LATITAT*.

DURING my attendance in the court of king's-bench laſt Michaelmas term *, I heard the caſe of Lampley and Thomas argued; wherein the only point diſcuſſed was, whether a *latitat* out of that court could run into Wales, which came in queſtion upon a plea to the juriſdiction. I confeſs I thought it ſtrange, that a queſtion of juriſdiction over ſo large a country ſhould then be ſtarted for the firſt time; eſpecially as Wales had been united to the kingdom above two hundred years, and no alteration had been made in the laws of that country with reſpect to the adminiſtration or juſtice ſince 34. and 35. of H. 8. This ſeemed to me a point of ſome curioſity; and I thought it worth while to examine a little more minutely into the ſtate and condition of that country, not only ſince that laſt mentioned ſtatute, but from

* Mich. Term 18. G. 2. In 1. Wilſ. 193. there is a report of the argument in the caſe. EDITOR.

from the time of E. 1. who made an entire conqueſt of it, in order to ſee, whether the king's-bench had in truth any authority for the exerciſe of that juriſdiction, which they are now going for the firſt time to eſtabliſh. And I muſt confeſs, upon the ſtricteſt ſearch I could make, and a ſerious conſideration as well of arguments as authority, this pretence of juriſdiction in the king's-bench appears to me to be not only unwarranted by law or precedent, but clearly oppoſed and contradicted by both.——As I had taken ſome pains in collecting the caſes upon which I formed this opinion, I thought it would not be an unuſeful exerciſe, as I had no other employment, to collect together in the form of an argument the reaſons and authorities that prevailed over my judgement.

It will be neceſſary in order to ſtate this matter fully to run over the hiſtory of Wales, ſo far as it relates to the juriſdiction, from the time of E. 1. to this day. This takes in two remarkable periods of time; the firſt from the time of its conqueſt in 12. E. 1. to the 27. H. 8. and 34. and 35. H. 8. when the union of it with England was eſtabliſhed by parliament: the ſecond begins from that laſt ſtatute, and goes down to the preſent time.

But before I enter upon this diſquiſition, I ſhall juſt take notice of the condition of that principality before the conqueſt, in order to give ſome anſwer to an argument Mr. Evans * uſed to prove the juriſdiction of the king's-bench in Wales even more ancient than the time of its conqueſt; for he took it for granted, that the princes of Wales had always been ſubject to the kings of England, and part of the ſame realm; and becauſe Edward the firſt, when he took David priſoner (who was the brother of Llewellyn the laſt reigning prince of that Britiſh race) had him tried and executed as a traitor, he inferred from thence, not only that David was Edward's ſubject, and conſequently liable to ſuffer ſo infamous a puniſhment; but that likewiſe he was tried in the court of king's-bench, and condemned there by virtue of their juriſdiction over Wales.

This without doubt is a very groundleſs conceit; for, whatever right of ſuperiority the kings of England had over the Welſh princes, yet they never claimed more than that feudal lordſhip which conſiſted in homage, tribute, and juriſdiction, where the prince himſelf was party, and had any contention with his barons and great lords. That the Engliſh kings did in fact exerciſe this ſovereignty is apparent; and it is as apparent, that the Welſh

* One of the counſel who argued for the juriſdiction of the king's-bench in Lampley and Thomas. EDITOR.

Welſh princes, as often as they durſt, diſclaimed ſuch dependency, and never ſubmitted thereunto but by compulſion and enforcement. But without entering into a diſcuſſion about Edward's lawful title (which by the by it would be hard to ſupport), thus much at leaſt is clear, that this claim of ſovereignty over the prince had nothing to do with the ordinary adminiſtration of juſtice in either kingdom; for this ſubjection was due not to the kingdom, but only to the crown of England; and both countries, tho' united under one head, remained two diſtinct realms, and abſolutely independent of each other.

There is a very curious record extant, which will be very material for this purpoſe, and is at large in a book of the Welſh laws publiſhed not long ago by Dr. Wotton*. This record contains a commiſſion to examine witneſſes in Wales, together with their depoſitions touching ſome points on which Edward meant to eſtabliſh this right of ſovereignty. This commiſſion was executed in the 9th year of his reign, three years before the conqueſt. The commiſſioners, the biſhop of St. David's, Reginald de Grey, and Walter de Hopton, ſat in Cheſter, Montgomery, the White Monaſtery, and in Lamperdawer, in Cardiganſhire; places all under the dominion of the king of England; and the depoſitions were taken without ſummoning the prince of Wales, or without examining, as appears, any of his ſubjects. Beſides this, it is very probable, that the commiſſioners took care to ſelect ſuch perſons for examination, as were moſt favourable to Edward's claim. Now, notwithſtanding all theſe marks of partiality and injuſtice which attend this proceeding, yet the contrariety of evidence (for ſuch there is) makes one ſtrongly ſuſpect, that Edward's pretended right was no better than uſurpation.

The principal heads of enquiry in this examination, to ſtate them ſhortly, were,

Firſt, what right Edward had to determine matters in difference between the prince and his barons, or between the barons themſelves.

Secondly, in whom the power of making laws was inveſted.

Thirdly, how far the Engliſh method of trial by jury had grown into practice among the Welſh.

The meaning of this laſt may not appear ſo material at firſt ſight. But the argument drawn from it was of great ſervice to Edward; who, like all other ambitious princes, was deſirous to colour over his uſurpation with ſome appearance of juſtice. For if in fact this method of trial, which was peculiar to England,

* See Wott. Leg. Wall. 518. to 531. in Append.——EDITOR.

and

and very different from the method of trial by the Welſh law, had been introduced into that country for a conſiderable number of years before, this might be urged as a concurrent argument to prove that ſubjection to the Engliſh which Edward wanted to eſtabliſh.

It muſt be obſerved here, that this king dealt afterwards with the king of Scotland in the ſame manner; and indeed the eſtabliſhment of this paramount ſovereignty over the whole iſland ſeems to have been the intereſting point in his reign.

But to go on with this examination under the firſt head, the right of exerciſing juriſdiction over the prince and his barons, it is to be obſerved, that the witneſſes are only aſked to the fact, and required to produce inſtances to the practice; for it might have been dangerous to have queſtioned them as to the right.

Now it is very true, that ſome inſtances were mentioned when diſputes between the princes of Wales and their barons, and ſome between the barons themſelves, had been determined by the king's juſtices. But they are but few, and thoſe not vouched by any records, but related only upon memory, and the accounts ſo defective and inaccurate, that a man at this time of day would not recover a pepper-corn upon ſuch ſlight evidence.

Under the ſecond head, the power of making or altering laws, ſome of the witneſſes give it to the kings of England, and others as expreſsly to the princes of Wales.

Under the laſt head, touching the trials by jury, the account given is as looſe and unſatisfactory as any of the reſt: for ſome ſay it had been practiſed only of late times, others more anciently; ſome hold the defendant might proceed by which law he thought fit; and ſome inſiſt, that the lord in whoſe court the plea was pending might appoint what kind of trial he pleaſed, and was entitled to a fine from the parties for granting them the privilege of this trial *per inquiſitionem*; laſtly, ſome anſwer the practice had been both ways, and that ſometimes the jury gave their verdict without oath.

From hence one may make ſome conjecture on the juſtice of Edward's claim. But, ſuch as it was, he thought fit to maintain it; and accordingly in the preamble to the ſtatute of Snowdon *, he ſays expreſsly, that this principality, which belonged to him before *jure feodi*, was now by conqueſt be-

* The 12. E. 1. commonly called *ſtatutum Walliæ* is meant, that ſtatute being addreſſed in the name of the king *omnibus fidelibus ſuis de terrâ ſuâ* SNAUDON, *et de aliis terris ſuis in* WALLIA.—EDITOR.

come

come his own *jure proprietatis*, which in effect amounted to a claim by eſcheat, as Llewellyn was dead and his brother attainted.

From this ſhort account it is manifeſt,

In the firſt place, that Wales before the time of E. 1. was no part of the realm of England; and this will be made out ſtill more clearly, when I come to conſider the condition of this country after its conqueſt.

Secondly, that it was governed by laws of its own, which had no affinity with the laws of England.

Thirdly, that Edward's claim of juriſdiction allowed in its full extent amounted to no more than this, a power of determining all cauſes wherein the prince of Wales was party: and it muſt be further obſerved, that this power was exerciſed not by ordinary juriſdiction of the king's-bench, but by ſpecial commiſſion to juſtices aſſigned to hear thoſe particular cauſes; and it appears by thoſe depoſitions already mentioned, that Welſh judges were ſometimes joined in commiſſion with the Engliſh.

In the laſt place it is certain, that Edward claimed the ſame right over the kings of Scotland, as the ſuperior lord under whom that kingdom was held, and accordingly did in fact ſummon the king of Scotland to appear before him at York, to anſwer to a complaint made againſt him by one of his own ſubjects; and although that king made ſome difficulty at firſt to obey the precept, yet at laſt he did appear in perſon and pleaded.—This is to be ſeen in a notable record in Ryley, p. 157.

Thus you ſee, that Edward's right, if it ſhould be admitted, was no more than a feudal ſovereignty over the prince of Wales as his vaſſal: a tenure, by which he himſelf held his dominions in Normandy and Aquitain under the king of France. And the German princes at this day, as I conceive, hold their territories in the ſame manner under the emperor as fiefs of his crown. And therefore nothing can be more abſurd than to conclude from this vaſſalage and ſubjection of Wales to the king of England, as the ſuperior lord, that the king's courts at Weſtminſter ſent their writs thither in common cauſes by virtue of their ordinary juriſdiction. There is no occaſion, however, to teize this matter any further at preſent. How vain this pretence is, will appear, when I come to conſider the condition of this country after the conqueſt; wherein it will be made evident, that the king's courts were not even then intitled to this juriſdiction, which Mr. Evans has inveſted them with before the conqueſt from this ſingle inſtance of David's execution.

I come

I come now to conſider the ſtate and condition of Wales after its conqueſt, viz. from the 12. E. 1. to the 27. H. 8. when it was firſt united to England. And here I ſhall obſerve the following method.

I. I ſhall give ſome account of the lordſhips marchers,
1. As to their extent.
2. The power and juriſdiction of the lords.
3. The caſes wherein the king's courts exerciſed juriſdiction in cauſes ariſing within theſe marches.

II. In the next place, I ſhall give an account of the ancient Welſh ſhires which made up what was properly the principality, and were under the immediate government of the kings of England; and therein ſtate,
1. The juriſdiction exerciſed in thoſe ſhires.
2. Their independency of the king's courts at Weſtminſter.

I. All that country, then, which conſiſts of the twelve Welſh counties, together with the county of Monmouth, and ſeveral lordſhips, which by the 27. H. 8. were annexed to the Engliſh counties of Salop, Hereford, and Glouceſter, was then called, by one name, Wales; and no part of this territory was ever parcel of the realm of England, till the union by the ſtatute 34. and 35. H. 8. except only Monmouth, and thoſe other lordſhips which were added to the Engliſh counties by 27. H. 8.

This land, at the time of the conqueſt, conſiſted partly of lordſhips marchers, which had been from time to time won from the Welſh, ſome of which were kept by the king in his own hands, and others granted to Engliſh lords, to hold of the kings of England *in capite*; partly of counties, which the kings of England had conquered and kept in their own hands, as the counties of Cardigan, and Caermarthen, and Flint; for the county of Pembroke, which was called a county palatine, differed in no other reſpect from a lordſhip marcher but in name only; and partly of the counties, which were properly the principality of Wales, which principality was then reduced to the three ſhires of North Wales.

The marches were, as the word ſignifies, the borders, and contained certain ſignories beyond the Engliſh line. Theſe were, after they were conquered, granted to Engliſhmen, who held of the kings of England, to be a barrier and outwork againſt the invaſions of the Welſh; and that theſe lords might be the better enabled to aſſemble their men together, and reſiſt any ſudden attack, they were each of them inveſted with regal power, which they exerciſed

ciſed in as high a degree as the king himſelf, ſave only, that they were ſubject to his curb and controul whenever they exceeded the limits of their power. Theſe marches were probably in the beginning, as the word imports, no more than borders. But, by degrees, as the Engliſh arms prevailed, and extended further in the country, this tenure increaſed, and new marches were created as faſt as they were conquered; ſo that in proceſs of time theſe borders, which were at firſt no more than a line of ſeparation to ſecure the Engliſh from the inroads of the Welſh, ſpread into the very heart of Wales, and the country itſelf grew to be conſiderably leſs than its confines.

Now as to the extent of theſe marches, it appears by the ſtatute 27 H. 8. that out of theſe only were erected five new counties, Monmouth, Denbigh, Montgomery, and Radnor, to which I will add Glamorgan, for reaſons that I will mention by and by. Beſides theſe, many other lordſhips marchers, which are particularly mentioned in the ſtatute, are annexed to the Welſh counties on the one ſide, and to the Engliſh on the other. So extenſive were the lordſhips marchers in the time of H. 8. But if any one thinks this is no evidence to prove their extent in the time of E. 1. for that many might have been created ſince that time; I anſwer,—In the firſt place, it is hard to conceive, that, after Wales was entirely ſubdued, the king ſhould have created any new tenures of this kind, when that ſervice was at an end for which they were created. In the next place, it is to be imagined, that the kings of England, ſo far from multiplying theſe ſignories, would (if they had been able) have reduced thoſe which already exiſted; for it was as much as they could do with all their power to keep thoſe petty kings in order: and I make no doubt, but H. 4. who found ſuch difficulty in maſtering Owen Glendower and the Mortimers, who were lords marchers, would have abſolutely extinguiſhed this tenure, if he could have prevailed upon his parliament to have concurred with him; and inſtead of making thoſe ſevere ordinances, which he did againſt the Welſh, which were but imperfect remedies of the miſchief, would have rooted out the cauſe of all theſe diſorders, by deſtroying that great power of the lords marchers from whence they ſprung. The laſt reaſon I ſhall give, to prove this to have been the extent of the marches in the time of E. 1. is from the ſtatute of Snowdon; and that ſtatute being made to extend only to the counties of Cardigan and Caermarthen, together with the three ſhires of North Wales, it follows, that all the reſt of the country, which needed no regulation, was in the hands of lords marchers; for of the remaining counties Flint and Pembroke, the firſt was annexed to the county

palatine of Cheſter, and the latter was then in the hands of William de Valence, as a county palatine of itſelf. Ryl. 42. 45. 49. 210. And it is to be obſerved, that the ſtatute of H. 8. which divides the whole territory of Wales into marches and counties, reckons up but ſix ancient ſhires, viz. thoſe five I have mentioned, and the county of Glamorgan.

As to the county of Glamorgan, when it was firſt erected into a county, does not appear. There is notice taken of it as a county in a record in the Exchequer, 4 H. 4. R. 5. where the entry is in theſe words, *De G. P. occaſionato ad reſpondend' de exitibus officii vicecomitis comitatuum Glamorgan & Merioneth.* But that it was not a county in the time of E. 1. ſeemed probable to me, becauſe no mention is made of it in the ſtatute of Snowdon; and upon looking into Ryley, I found that this Glamorgan was in the time of E. 1. a great lordſhip, which belonged to Gilbert de Clare Earl of Glouceſter, between whom and Humphrey de Bohun Earl of Hereford there was a famous proceeding in the 19 E. 1. Theſe two noblemen, it ſeems, had a diſpute about a piece of land, which lay between their ſignories. The Earl of Hereford was lord of Breghennok, and the Earl of Glouceſter was lord of Morgannon. Now, although a ſuit was actually pending in the king's court concerning the right to this piece of land; yet the two earls were too powerful and impatient to wait the event of the cauſe, and ſo endeavoured to take poſſeſſion thereof by force; and, notwithſtanding the king's inhibition once or twice repeated, continued to commit hoſtilities againſt each other, till at laſt the king ſummoned them both to appear in parliament. The whole proceedings are at length in Ryley, and are very curious; but there is no occaſion to take any further notice of it here. Now this land of the earl of Glouceſter, which is called *Morgannon* throughout the whole record, is certainly the ſame with Glamorgan. For, to omit other reaſons, ſuch as its neighbourhood to Breghennok, and that there is no other diſtrict or honour known at this day by the name of Morgannon, beſides the ſimilitude of the names, being the ſame in two ſyllables, there is an expreſs mention made of this very land by the name of *Glawmorgan* in the proceeding of parliament the ſame year; for, both the earls being found guilty, their liberties were ſeized, and a *cuſtos* was put in each of them. The words are theſe: "*Mandetur Rogerus de Burghull & aſſignetur* "*ad cuſtodiend. libertat. regales in terris com. Glouceſter de* Glaw- "morgan *& etiam in terris com. Hereford de Breghennok, quæ li-* "*bertat. per judicium et conſiderationem totius conſilii dom. regis* "*remanent in manu dom. regis, prout alibi patet plenius, ratione* "*contemptûs in obedientiæ & tranſgreſſ. de quibus præfati comites* "*ſunt convicti.*" Ryl. p. 103.

This

This I thought juſt to take notice of; becauſe, the 27 H. 8. takes notice of the county of Glamorgan as one of the ancient Welſh ſhires: which if any man thinks, with many other obſervations in the courſe of this argument, trifling and impertinent to the matter in hand, I will readily confeſs as much; but nevertheleſs think I may be fairly excuſed, if in handling this point for my own curioſity, without intending it either for the Preſs or the Court, I play with any little matter of antiquity for my own diverſion.

Thus much ſhall ſuffice for the extent of theſe lordſhips marchers. Only, before I proceed, I will juſt mention my authority for aſſerting, that all Wales, except only the three northern ſhires, was in the hands of the Engliſh before the time of E. 1.

It is to be noted, that before the three Welſh ſhires, as Glamorgan was a marcher, there were but four remaining; namely, Pembroke, which had been a county palatine under the kings of England many years before, as appears in the caſe of William de Valence, Ryl. 210. and Flint, Cardigan, and Caermarthen. And theſe three laſt were granted by Hen. 3. to his ſon Ed. after Ed. 1. In this patent, Flint and ſome other caſtles are deſcribed as late conqueſts. But the caſtles of Cardigan and Caermarthen are mentioned ſimply, without any notice taken how long they had been in the king's poſſeſſion. This grant of Hen. 3. is recited at large in a manuſcript I have by me of lord Hale's concerning the king's prerogative. Concerning the county of Caermarthen, I have likewiſe picked up another teſtimony in Ryley, in the caſe of William de Breouſe; which was about 20 E. 1. He claimed, it ſeems, *jura regalia* within the lordſhip of Gower, which the juſtice of Weſt Wales inſiſted to be within the precinct of the king's county of Caermarthen; and, being interrupted in the exerciſe of this right, he preferred his petition in parliament againſt the juſticiary; in anſwer to which claim, Nicholas Warwick for the king (I do not ſet out the title at large) ſtates, that William Breouſe, the father of the preſent William, after the war of Eveſham, *ſectam illam ſibi attraxit, et domino regi patri domini reg. nunc ſubtraxit et ipſum dominum reg. de illâ ſectâ ad comitatum de Kermerdyn faciendâ omnino exhæredavit, et juriſdictionem regalem, quam idem Wilhelmus, qui nunc eſt, clamat in prædictâ terrâ, ſuper dominum regem patrem domini regis nunc uſurpavit.* Ryl. 234. 236.

Having now diſpatched theſe points of enquiry, which in truth are little better than mere curioſities, and yet perhaps not altogether uſeleſs in clearing up what follows, I ſhall draw nearer to the point, and conſider the power and juriſdiction of the

lords marchers; firſt premiſing, that the marches of Wales were neither part of the realm of England, nor governed by the Engliſh laws; which will be ſufficiently proved from the caſes cited hereafter.

The lords marchers in their ſeveral ſignories had all royal rights, in as high and ample manner as the king himſelf; except only in ſome inſtances, which ſhall be taken notice of by and by. And this enjoyment of royal rights conſiſted in the following particulars, moſt of which I ſhall ſtate as ſet forth in a plea of Thomas Cornwall to a *quo warranto* brought againſt him for uſing certain franchiſes in his manor, which had been a marcher. Co. Entr. 549. It is true, there is a demurrer to this plea in the book, but no judgment is given; and lord Coke, 4 Inſt. 244. refers to this record as a notable precedent to ſhew the condition of Wales before the ſtatute 27 H. 8. However, I don't reſt upon this authority; for all the ſeveral rights there mentioned will appear to be confirmed by other and better teſtimony.

1. All writs within the ſignory run in the name of the lords, and were *contra pacem* of the lord. 27 H. 8. c. 24. an act for recontinuing certain liberties, &c. in the crown.

2. The lord marcher had judgment of life and limb in all capital and criminal caſes; and to this was annexed the power of pardoning all offences. *Ibid.*

[Theſe two drew after them of courſe the forfeitures of all lands, goods, and chattels of felons. Caſe of John Giffard and Rob. de Tibitot *juſtic. domini regis*, Ryl. 141. Caſe of Bogo de Knouvill and Roger de Montgomery, Ryl. 63. 27 H. 8. c. 24. 26 H. 8. c. 6.]

3. The lord marcher had a power of conſtituting boroughs. 34 and 35 H. 8.

4. He had a power of appointing juſtices of oyer and terminer, &c. 27 H. 8. c. 24.

5. He had a right to hold plea of all actions real, perſonal, and mixt, within his ſignory.

6. The king's writ could not run into the marches, nor could the king *intromittere* (as the expreſſion is in the record) into any of thoſe liberties, for the execution of juſtice.

Theſe

Theſe two laſt heads may be reduced into one, viz. an unlimited exempt juriſdiction in all cauſes ariſing within the ſignory.

In conſequence of this, the lords had each of them their own chancery for original writs. To ſhew this exempt juriſdiction, the expreſſion in the petition of William de Breouſe to the king in parliament is very remarkable. Ryl. 234. "Le dit William prie a noſtre ſeigneur le roy & a ſon conſeil, par la ou nul home ne doit aver conuſance de luy ne de ſa gent de Gowr, *forſque devant le corps le roy meſme.*" And afterwards in the pleadings he ſtates his right thus: *Quæ quidem libertas & juriſdictio tales ſunt, quòd ipſe debeat cancellarium ſuum in eâdem cancellariâ habere hominibus & tenentibus ſuis terræ prædictæ de Gowr de ſervicientia cùm neceſſe fuerit, judicium vitæ et membrorum, & etiam cognitionem omnium placitorum tam coronæ quàm aliorum quorumcunq' infra dictam terram inter quaſcunq' perſonas emergentium, ut de terrâ in* MARCHIA *extra comitatum prædictum de Kermerdyn & extra poteſtatem vicecomitis ejuſdem comitatûs exiſtente.*

But notwithſtanding this excluſive juriſdiction, there were I confeſs two ſorts of cauſes, wherein the king's courts held plea, tho' they aroſe within the marches.—The firſt took in all controverſies *when the lord marcher was a party*, either in reſpect to the lordſhip itſelf or the boundaries of it.—The ſecond comprehended all ſuch cauſes, where it was neceſſary to write to the biſhop, as *quare impedits*, and all iſſues of marriage and baſtardy, which were triable by the biſhop's certificate; and theſe were all tried in the next adjoining Engliſh county.—The reaſon, why the lord marcher could not hold plea in the firſt caſes, is obvious; becauſe then he would in effect be party and judge. The reaſon why he could not try *quare impedits*, &c. was, becauſe the biſhop, who was as great a man as himſelf, would not obey his writ, and ſcorned to certify under any command but the king's. But why was the court of king's-bench preſently to lay hold of theſe pleas? For does it follow, that, becauſe there is a defect of juſtice in any country out of the realm of England, the king's-bench muſt immediately interfere to cure this defect? The natural and proper reſort in theſe places is to the king himſelf and his council.

If this power, indeed, be inherent in the court, how comes it to paſs, they have never exerciſed it in Jerſey, Guernſey, or the Plantations? Nay, why have they ſuffered that little town of Berwick to live ſo long undiſturbed? The marches were as much out of the realm as thoſe places. But the judges of ancient times were more modeſt, and better content with their limited authority than ſome of the modern ones have been.

Theſe

These reasons make me subscribe to my lord Vaughan's opinion †, which is well grounded upon a case in Fitzherbert Ass. 382. 18 E. 2, that this power was given by an act of parliament, and the book is express to this purpose.—Assise was taken in the county of Glouceſter of the barony of Gower in Wales; and in a writ of error exception was taken, among other things; because by the ſtatute of Weſtminſter aſſizes muſt be taken in the county where the land lies, and Gower was not in any county. Scrope, who gave the rule, ſays,—"As to that which is ſaid, "that the writ ſhall not be directed to the ſheriff of Glouceſter, "and that the tenants were out of the power of the ſheriff, and "that the tenements were not in the county, ſir, I anſwer, "Gours is a barony in the marches of Wales: and I ſay, that "every barony of the marches has a chancery and its own writs, "ſo that when one of the tenants does wrong to another he "ſhall do right; but when the *baron is ouſted of his intire barony*, "he cannot have remedy by his own writ, becauſe he is ouſted of "all; and therefore *it is ordained in parliament*, when the baron "is ouſted of all his barony in the marches of Wales, he ought "to go to the king to purchaſe remedy, and ſhall have a writ in "the king's chancery, and the writ ſhall go to the ſheriff of the "next county."

How, when this act of parliament was made, or upon what occaſion, or whether it provided for any other caſes, does not appear; for the record of it is loſt; a misfortune common to many other acts as well as this. And this is no ſtrange thing, if we conſider how ancient this ſtatute was; as old probably as the marches themſelves.

This gives a fair and reaſonable account of the original of this uncommon juriſdiction, the trial of cauſes in the *next adjoining county*, which, upon this narrow foundation of one act of parliament made to provide for the inconvenience of one particular caſe, has now by long uſage grown to be the common trial for all matters and cauſes without diſtinction ariſing in the principality of Wales. And whereas the only reaſon in thoſe times, that can be ſuggeſted for the trial in the adjoining county, was to get a fair and impartial jury, which could not be had in the marches, where every man was vaſſal to the lord, the ſame method is now purſued in all caſes, as if it was impoſſible to find twelve honeſt men in Wales.

This wipe by the by for the court of exchequer.

But be this as it will, whether this method of trial took its riſe from act of parliament or not, it is very certain, the king's courts did exerciſe ſuch juriſdiction as is abovementioned in thoſe

† Vaugh. 403.—Editor.

particular

particular cauſes; and it is as certain, that their juriſdiction was exerciſed in no other; ſo that theſe exceptions, ſtill confirming the general rule, as often as they are mentioned, give it much ſtronger eſtabliſhment, than if there had been none: for if there had been no ſuch exceptions, there would have been no caſes in the books relating to this matter; and then the judges, taking advantage of this ſilence and a few modern inſtances, would preſently have determined the point in favour of themſelves. This they have already done in the caſes of the counties palatine, as I could ſhew, if it were needful here. But in the preſent queſtion there are caſes, which are clear and expreſs, and they ſhall hear of them preſently.

II. I come now to conſider the juriſdiction exerciſed in the ancient ſhires of Wales, and to ſhew their independency of the king's courts at Weſtminſter.

This juriſdiction was eſtabliſhed by that famous ſtatute of Snowdon, which was made in the 12th year of E. 1, ſoon after he had conquered Wales, to which I refer the reader.

There has been ſome diſpute, whether theſe laws were enacted in the Engliſh parliament, or ordained by the king himſelf; and Mr. Evans ſeemed to think, that, as this ſtatute was made by an Engliſh parliament, it would prove Wales to be a part of the Engliſh realm.

But in anſwer to this, admitting this ſtatute to have been an act of parliament, the conſequence, that Wales was therefore part of the realm of England, will not follow; for it is plain, that at this day the Engliſh parliament binds Ireland, Jerſey, and Guernſey, Berwick, and the plantations, if they are ſpecially named; and yet theſe are confeſſedly no parts of the realm of England.

In the next place there is great reaſon to believe, that this ſtatute was no act of parliament, from thoſe circumſtances mentioned by lord Vaughan; viz. that no ſuch parliament is found ſummoned in that year, nor law made in it; nor is it likely at that time a parliament of England ſhould be ſummoned at Rotelan, which is doubtleſs in Wales: to which I will add two more. One is from the form at the end, "*In cujus rei teſtimonium ſigillum noſtrum eſt*;" a form, which I have not obſerved to be uſed in any old act of parliament. The other is, that, as before the conqueſt the king of England diſputed the right of making laws in Wales with the princes, and was able to produce ſome evidence in ſupport of his claim then, as appears by the depoſitions already mentioned, it follows, that this right after the conqueſt muſt have remained ſolely in him without any conteſt; and

it

is very unlikely, that he would have given up ſo great a point of prerogative to his parliament without any reaſon.

But to proceed, this government and juriſdiction of the principality of this ſtate was framed in all reſpects upon the Engliſh plan.

The juſtices were conſtituted by like commiſſion with the juſtices in England, and inveſted with all juriſdiction as full and extenſive as well in bank, as in their circuits.

The ſheriffs had the ſame power in their tourns and county courts, and the office correſponded in all points with the Engliſh ſheriffalty.

They had their chancery and exchequer anſwerable to ours, and the methods of proceeding in all actions real and perſonal were the ſame without any variation as our methods of proceeding in England.

But there was this difference as to the extent of juriſdiction; that, whereas in England the great courts of juſtice reach over the whole kingdom, in the Welſh ſhires theſe courts were reſtrained in their limits. For the three ſhires of North Wales were governed by the king's juſtices there, and their juriſdiction was bounded by theſe three ſhires; and the counties of Cardigan and Caermarthen were each under their juſtices, who were confined to the exerciſe of their authority within thoſe reſpective counties. But tho' theſe courts were circumſcribed in their limits, yet their powers within their reſpective diſtricts were as high, as ample, as unconfined, as thoſe of the king's great courts at Weſtminſter within theirs; and if any thinks this local reſtraint of juriſdiction any argument to prove an inferiority in the Welſh courts, the ſame argument would hold as ſtrongly againſt the Engliſh courts at preſent, which confeſſedly neither do nor can ſend their proceſs into Jerſey or Guernſey, nay not to Berwick upon Tweed.

Thus were theſe courts ſiſters of the courts of Weſtminſter, and in all reſpects their equals; not held in franchiſe like the lordſhips marchers or counties palatine, but ſprung and derived from the ſame ſource.

Now, in this light, can any thing ſhew more abſurdity, than this pretence of ſuperior juriſdiction in the court of king's-bench, which, in truth, is a contention of the king againſt himſelf? Nor do I think, that any argument can be invented to give this ſuperiority to one court, which may not be urged as ſtrongly on the behalf of the others.

If the court of king's-bench will ſay, as the lion did, that this belongs to me, becauſe I am ſtronger; the reaſon, I confeſs, is unanſwerable. But one would hardly expect ſuch brute-like dealings from the grave men in fur, who have nothing in their mouths but law and juſtice and impartiality.

Now,

Now, that no one may think, this equality of power and dignity is a mere *gratis dictum*, and an assertion without good proof, notwithstanding it is already sufficiently apparent from the statute of Snowdon. I will produce another authority, which is express in point, and that is in the year-book of 19 H. 6. 12.

This was a debt for rent upon a lease for years made in Middlesex of land in the duchy of Lancaster, to which the defendant pleaded a local plea, that the plaintiff entered upon him and ejected him. The doubt was, whether this issue should be tried in the next adjoining county, or sent down into the duchy. In the debate of this case the counsel fell upon a discourse concerning Wales; for the reason urged, why in this case the issue should be tried in the county adjoining, was, because this was the practice in Wales.—Ascue, whose business it was to distinguish Wales from a county palatine, says this: "If erroneous "judgment should be given in a county palatine, as in Durham, "&c. this shall be redressed here at common law. But if there "is error in any judgment in Wales, this cannot be amended in "this kingdom, *except only in parliament*; *which proves that this "court has no jurisdiction there*, &c. So it seems there is a great "diversity between Wales and a county palatine."—In answer to this Newton says, "As to what is said, that error made in "the county palatine shall be redressed here, and error made in "Wales shall be amended in parliament and not here, and that "for this cause there shall be diversity between Wales and a "county palatine; Sir, this is not the diversity; for the reason "that error made in counties palatine shall be redressed here, is "because it is a higher court; but in Wales, if error be made "in the court of any lord, this shall be amended there before "the justices errant; and if error be before the justices errant, "*because that that court is as high as any court of the king except the "court of parliament*, it is necessary that this should be redressed "there; and so to my understanding, if the justices errant were "not there, the error should be redressed here in the king's "court."

Now this is a very strong authority coming out of the mouth of one, whose point was to prove Wales was within the jurisdiction of the king's bench. You will observe the fact, that writs of error lay not to the king's-bench but to the parliament, is agreed by both. They differ only in the conclusion drawn from it. Ascue, who spoke against the jurisdiction, cited this instance to maintain the difference, which Forteſcue had laid down before in the same case, "that Wales was a kingdom "at one time by itself, but that Lancaster, Chester, and Durham, "were derived out of the crown, and were once at common

"law

" law all one kingdom." Newton, on the other hand, denies this conſequence; for, ſays he in effect, the error of the juſtices errant would not be redreſſed here, even though Wales had been derived out of this crown, and remained parcel of the realm. Why? Becauſe both courts are equal, and error muſt be always brought from an inferior to a ſuperior court. Now, without diſpute, what both aſſerted was true; with this difference, that Aſcue's was a ſound argument to prove his point; but Newton's had this fault, that it was a better for his adverſary than himſelf, and might have been thus retorted upon him.—Sir, admitting your reaſon to be the right one, though it will be of ſome uſe to refute the diverſity which I took between Wales and the county palatine, it will yet eſtabliſh another diverſity between them, which will be as material to my purpoſe, as it is deſtructive of yours. Our diſpute is, where this iſſue ſhall be tried. You ſay, the adjoining county; becauſe this is the practice in Wales. We ſay, that Wales is different in this reſpect from the county palatine. You deny it. Now the reaſon you have given is an unanſwerable argument, why the record cannot be ſent into Wales; becauſe the judges in Wales are equal with thoſe in England, and will not receive the record ſent by ſuch hands. But this not being the caſe in the counties palatine, becauſe the court there is inferior to this, inaſmuch as writs of error lie hither from thence; the record ought in this caſe to be ſent thither to be tried, becauſe they muſt obey our commands, as they are ſubordinate to us.

But, to let alone this minute examination, this caſe is ſufficient to ſhew, that writs of error came out of Wales into parliament without any regard to this mighty court of king's-bench; and Newton, who argued to prove Wales within their juriſdiction, does acknowledge the court before the juſtices in Wales to be as high as any court of the king, except the court of parliament.

This equality of the courts, equal in power and commiſſion, and repreſenting the ſame king in equal degree, I deſire may be heedfully attended to, for upon this hinge the preſent queſtion does principally turn; and although it has not been urged in this argument, it is of great weight and conſideration. I do not obſerve this argument has ever in the books been ſtarted, except in that caſe of Cardiff bridge, and others; and it was there treated with ſuch ſcorn, that I fear it will not gain reception now. " Certain orders of juſtices made purſuant to a private act of " parliament for repairing Cardiff bridge were removed hither " by *certiorari*; and one objection was made, that this court " could not ſend a *certiorari* to the juſtices of peace in Wales,

" becauſe

" becauſe it may be ſent by the court of grand ſeſſions, which " was as the king's bench, and which by this means was ſkip- " ped over and rendered uſeleſs. Now it is the conſtant practice " to ſend them into the counties palatine: and yet they have " original juriſdiction. The counſel for the Welſh juriſdiction " ſaid this differed, for the juriſdiction of counties palatine were " derived from the crown. But this was not regarded*."

The conſequence of all this is, that the king's courts at Weſtminſter never exerciſed juriſdiction in any cauſes ariſing within the principality, (and this I will be bound to affirm they did not) from the time of E. 1 to H. 8. except only in ſuch caſes where the king was party; for it muſt be obſerved, that it was an ancient and unqueſtionable prerogative, which no exception could bar, for the king to try his own cauſes in his own courts, if he pleaſed. This was lord Hale's opinion in that book of the Prerogative † 450, and he cites many records to prove it. And this explains thoſe two notes in Fitzherbert: " The lands in Wales, that are held of the king im- " mediately, are pleadable in England." Hil. 6 Hen. 5, " Fitz. Juriſdict. 34.——" *Quare impedit* brought by the " king againſt an abbot. POLE, the church is in Wales, where " the king's writ runs not; judgment, &c. *et non allocatur*; " *becauſe the king was party.*" Paſch. 15 E. 3 Ibid. 24.

22 E. 3. 20. le Roy ne grant franchiſe encountre lui-meme. Hal. Prerog. 452.

And now as to the two ſorts of cauſes whereof the king's courts held plea in the marches, viz. ſuch wherein the lords were parties, and *quare impedit*, &c. The firſt ſort could have no place in the principality, inaſmuch as the king's juſtices were indifferent perſons, and dealt juſtice impartially to all. And as to the laſt, the reaſon, which made it neceſſary for the king's-bench to interfere in the marches, could not hold here; for the writ, in that caſe awarded to the biſhops, was as much the king's writ, as that which iſſued out of the king's-bench; and it is expreſsly provided in the ſtatute of Snowdon, that, if the deforcient objects baſtardy, the biſhop ſhall write *ad capitalem juſticiarium Walliæ.*

Herein may be obſerved the difference between the ſhires and the marches; upon which difference, if the following rule be obſerved, it will be a clue to lead the reader thro' all the year-book caſes under this head; viz. that when *quare impedits* are ſaid to lie of churches in Wales, or lands in Wales are ſaid to be demandable in the king's-bench, you muſt always un-

* The report of Cardiff-bridge's caſe is from 1 Salk. 146. That caſe was in B. R. Trin. 12 W. 3, whilſt lord Holt was chief juſtice. The ſame caſe is in 1 L. Raym. 580, and 12 Mod. 403.—EDITOR.

† Lord Hale's Treatiſe on the Prerogative is not in print.—EDITOR.

derſtand

derſtand thoſe churches to be within the marches, and the lands to belong to the lords marches. This will clear up a ſeeming confuſion in the books, which has ariſen from hence, that, as all this country, both ſhires and marchers, were called by one name *Wales*, the caſes put are of lands and churches in Wales generally, without diſtinguiſhing between the ſhires and marches.

I will now produce the caſes to prove theſe points.

Fitz. Juriſd. 13 E. 3. 23.

Writ of coſinage for the caſtle and common of J. in *Wales*. Plea the juriſdiction.—PARNING. "Three things give juriſdiction here; one becauſe "the original writ was directed "to the ſheriff of Hereford, "who teſtified that he had ſummoned (*a*); another, becauſe "the tenant comes and affirms the ſummons; and "the third, that a view had "been had." And afterwards it was ſaid to PARNING, "that he ſhould ſay ſomething "elſe, if he could give the "court juriſdiction." And then WODSTOCK ſays, that the caſtle and commote was a great ſignory, and held in chief of the king; upon which the defendant pleads, and prays aid of the king (*b*).

(*a*) By this it is plain that the original writ could not go into Wales.

(*b*) Obſerve the moment the plaintiff ſays this land in Wales was a great ſignory, (i. e. a marcher) the defendant pleads; for if this land had laid in the ſhires, the plea would have been good.

47 Edw. 3. 5.

William de Coſſington and his wife brought a writ of dower, and the writ was to have reaſonable dower of the lands of huſband of the lands of Gower (*c*) in Wales.

(*c*) Note, this Gower was the very marcher belonging to William de Breouſe in the cauſe laſt-mentioned. Vide Brook's note upon this Juriſd. 14. that the earl of Warwick was lord of the entire ſignory, ſo that juſtice could not be had in Wales.

30 H. 6.

PRISOT ſays, of churches in Wales *quare impedit* ſhall be brought here, and yet the lands and other within Wales ſhall be determined *before the ſteward of the lords of Wales*, unleſs it *be of land between the lords* (*d*).

(*d*) Here Wales evidently means the marches; for the juriſdiction of the lord ſteward, and the excepted caſe of lands, between the lords, cannot by any poſſibility be applied to the ſhires of Wales.

35 H. 6. 34.

FORTESCUE. "There are "divers manners of franchiſes; "one in Wales, *where the king's* "*writ does not run*; for if *præ-* "*cipe quòd reddat* be brought "here of lands in Wales, if "recovery is had of theſe, it "is void, and *coram, non ju-* "*dice*, for *it is not parcel of the* "*realm of England, and there-* "*fore this court has no juriſdic-* "*tion there*, unleſs it be of ad- "vowſons; for *quare impedit* "ſhall be brought here of "churches in Wales, and ſhall "be ſued in the county ad- "joining, becauſe the *juſtices* "(*e*) will obey no man there."

(*e*) Note, lord Vaughan reads *biſhops*.

3 E. 13, 19.

Quare impedit of a church in Pole againſt the biſhop of St. Aſaph; defendant comes and defends the wrong and force, &c. and pleads to the juriſdiction, and he ſays the manor(*f*) was in the marches of Wales, *where the king's writ runs not.* It ſeems a fine had been levied of this manor in the common-pleas, and after the defendant waived his plea.

(*f*) This manor ſeems to have been a marcher; for in the end of the caſe, by way of precedent, HERLE ſays, a fine was levied here of land in Gours, and the ſheriff of Salop did the office; and the king's eſcheator on this ſide Trent ſhall ſeize the baronies in Wales after the death of the lords.

Note, there were eſcheators in the ſhires of Wales.

11 H. 6. 3.

Quare impedit, and to all the proceſs *nihil* was returned; and then it came to be a queſtion, whether the king ſhould have his writ to the biſhop.

CHANT. "The church is "in the iſland of Guernſey, "which is a royal franchiſe, "and is in the queen's hands. "and ſhe has franchiſe royal; "ſo the action ought to have "been

" been commenced there: and " the queen's juſtice ſhall a- " ward a writ to the biſhop."

DANBY. " *Quare* (g) *im-* " *pedit* is not maintainable in " any franchiſe royal; becauſe " they cannot award a writ to " the biſhop: for if a church " be in Wales, which is out of " the juriſdiction of the com- " mon law, the prince cannot " award a writ to the biſhop; " and for this cauſe the writ " ſhall be brought here. *But* " *other actions are not maintain-* " *able here for things done in* " *Wales, for the reaſon as* " *above.*"

CHANT. "In Durham, *qua-* " *re impedit* is maintainable, " and writ ſhall be awarded to " the biſhop in the ſame court, " and ſo in any other franchiſe. " In the ſame manner here, " it is a franchiſe royal."

NEWTON. " In Wales, no " *quare impedit* ſhall be main- " tained, but ſhall be brought " here; for although the juſti- " ces in Wales award a writ to " the biſhop, *he will obey none* " *but the king*, and the biſhop " has franchiſe royal as well as " the prince, and holds imme- " diately of the king, as the " prince does, ſo they will not " obey."

STRANGE. " It has been " uſed to have a *quare impedit* " in Wales, and to have a writ " to the biſhop; and the biſhop " ſhall ſerve it; and this I have " often ſeen."

DANBY and MARTIN ſaid, " that it could not be maintain- " ed only in the king's court. " —*Ideo quære.*"

(g) In *quare impedit*, although the franchiſe is challenged, it is not allowable; becauſe that execution cannot be made in a franchiſe. *Per* MOUBRAY, 40 E. 3. 1.

Obſerve from this and all the other caſes, that the only reaſon, why *quare impedit* could not be brought in any franchiſe or peculiar juriſdiction, was, becauſe the biſhop would not obey the lord's writ. Now that this was the caſe in the principality of Wales is evident from what has been already obſerved upon the ſtatute of Snowdon; and as to what is ſaid by Newton of the *prince*, when that ſtatute was made, there was no prince of Wales. This was but a temporary title, and the creation of a prince of Wales could never make any alteration in the juriſdiction. It is beſides remarkable, that at this very time, 11 H. 6. when Newton ſpeaks, there was no prince of Wales. Accordingly Strange contradicts him flatly, and vouches his own experience for his aſſertion. " It has been uſed," ſays he, " to have *quare impedit* in Wales, and to " have a writ to the biſhop, and the " biſhop ſhall ſerve it; and this I have " often ſeen."

Note, in this and the other caſes, how conſtantly it is ſaid and agreed, that Wales is out of the realm, and that no other action for cauſe ariſing in Wales can be brought here.

19 H. 6. 12. *

In debt the plaintiff counts of a leaſe made by him to defendant at ſuch a vill in the county of Middleſex of lands in the county of Lancaſter, for the term of ten years, rendering ſo much rent, &c. payable at ſuch feaſt, &c. and for ſo much there was arrear on ſuch a day, and afterwards the action accrued to him. And the defendant ſays, that before this day the plaintiff entered upon him; and upon that iſſue is joined.

FORTESCUE prayed, "that "the record ſhould be ſent into "the county palatine, to be "tried there."

NEWTON. "It ſeems it "ſhall be tried in the county "adjoining, as it ſhall be, if "the land was in Wales; for "then ſuch trial ought to be in "the county of Hereford, or "other adjoining."

FORTESCUE. "Sir, *there is a "great diverſity between Wales, "which was a kingdom of itſelf,* "and Lancaſter, Cheſter, and "Durham, *which were derived "out of the crown, and were "once at common law all one "kingdom, and now are coun-"ties palatine.* For *to theſe the "king may well ſend the record "to be tried; becauſe he could do "ſo before the derivation. But "he cannot ſend it to Wales, "becauſe that at common law he "could not do ſo.* And this is

* Part of the caſe here cited from the Year-book of 19 H. 6. is given and argued upon before, p. 393. but here the whole is extracted.—EDITOR.

"the

" the reaſon that the *ſtatute* (*b*)
" *wills of things pleaded in*
" *Wales, as a releaſe bearing date*
" *there, that it ſhall be tried in*
" *the county adjoining.*"

NWETON. (*i*) " Sir, *if in*
" *the court of a lord of Wales a*
" *deed is pleaded* bearing date
" in a royal ſignory, in this
" caſe one court has not power
" to write to another court to
" try this deed; in which caſe
" it ſhall be ſent hither, which
" proves the juriſdiction of this
" court to extend to Wales."

ASCUE. " If erroneous judg-
" ment ſhould be given in a
" county palatine, as in Dur-
" ham, this ſhall be redreſſed
" here at common law. But if
" there is error in any judg-
" ment in Wales, this cannot
" be amended in this kingdom,
" except only in parliament,
" which proves this court has
" no juriſdiction there. And
" the law wills, that the deed
" ſhould be tried where it bears
" date; but in Wales it cannot
" be tried by the power of this
" court; for which reaſon it
" muſt be tried in the county
" adjoining. So it ſeems there
" is a great diverſity between
" Wales and a county palatine,
" as Forteſcue has well ſaid."

NEWTON. " If action of
" dower be ſued in court of any
" royal ſignory in Wales, and
" they are there at iſſue upon *n'*
" *unques accouple en loyal matri-*
" *monie*, now this iſſue is to be
" tried by the biſhop, but the

(*b*) It does not appear what ſtatute this is, that Forteſcue here ſpeaks of; unleſs it be that which Fitzherbert ſpeaks of †, and which is now loſt, for there is no ſtatute extant to maintain this point.

(*i*) If this caſe put by Newton be law, then it muſt be added to the others I have mentioned, wherein the king's-bench hold juriſdiction in the marches.

† See before p. 390.—EDITOR.

" court

" court there has no power to " make proceſs to the biſhop " (*k*); but the king ſhall write " to the mareſchal there to " bring the record into this " court, and then we will make " proceſs to the biſhop; which " proves, that the juriſdiction " of this court extends to " Wales, as well as to counties " palatine."

FULTHORP. " If one is " vouched here, and the party " prays he ſhall be ſummoned " in a county palatine, we ſhall " make proceſs immediately to " them. But if he is ſummon- " ed in Wales, we ſhall not " write to them in Wales, but " to the ſheriff of ſome county " adjoining, to ſummon him. " And the diverſity and reaſon " is as Forteſcue has ſaid. " Wherefore," &c.

NEWTON. " As to what is " ſaid, that error made in the " county palatine ſhall be re- " dreſſed here, and error made " in Wales ſhall be amended " by the parliament, and not " here, and that for this cauſe " there ſhall be a diverſity be- " tween Wales and county pa- " latine: Sir, this is not the " diverſity. For the reaſon that " error made in counties pala- " tine ſhall be *redreſſed here is, " becauſe it is a higher court:* " But in Wales, if error is " made in the court of any " lord, this ſhall be redreſſed " there; and if error be before " the juſtices errant, *becauſe " that that court is* as high as " any court of the king, except " the parliament, it is neceſ- " ſary that this ſhould be re- " dreſſed there; and ſo to my

(*k*) Note, this caſe here mentioned and that put before by Newton are the only inſtances I have met with where the king's writ ever entered Wales. For it is very remarkable, that, in *quare impedit*, and diſputes between the lords themſelves, and the caſe cited afterwards by Fulthorpe of foreign vouchers, all the proceſs went no further than the adjoining county; and the reaſon given is, becauſe the court has no power to go further.

"understanding, if justices errant were not there, the error "should be redressed here in "the king's court. And, Sir, "*when the manor of Burgavenny was lately demanded here, "the writ was directed to the "sheriff of Hereford to summon "the tenant in the same manor, "which was in Wales; and so "it seems that Wales and counties palatine* are of one nature: in which case, the "issue at bar shall be tried by "the county adjoining to the "county palatine, and not in "the county palatine."

ASCUE. "To my intent, "always at common law the "king's justices could send to "the county palatine to try "any thing done there. But "because that by such trial the "party had delay, 9 E. 3. was "made, that when any deed, "bearing date in any franchise "in the kingdom, where the "king's writ does not run, "should be pleaded, this "should be tried where the "writ was brought. The same "statute proves, that it extends not to deeds bearing "date in Wales; but all such "deeds, and all other things "alledged in Wales, shall be "tried in the next county adjoining, by the law; because "that otherwise right should "fail to the party, in as much "as it cannot be tried in Wales "by the authority of this "court. But this court has "power to send to the lord of "the county palatine to try any "thing done within his county "palatine, and to certify it "here; and this has been often done. Wherefore Wales

" is not like a county pala-
tine †"

† Hen. 6. Action upon bond; plea, "conditions performed in biſhoprick of Durham."—Same point argued again, and no notice taken of Wales. Three expedients—1. To ſend the record into county palatine, to be tried there, and remanded.—2. To try where pleaded by the equity of 9 E. 3. c. 4—3. To ſummon jury from the franchiſe to try it at bar.

30 H. 6. 6, Action of debt againſt gaoler of cinque ports for letting A. at large, who was in execution to the plaintiff upon judgment recovered againſt him there. *Nul tiel record* pleaded. Writ to the conſtable of Dover to certify, &c.—Objection, that the court could not write to conſtable.—PRISOT, C. I. C. B. who gives the rule: "Of churches in Wales *quare impedit* ſhall " be brought here, and yet the lands and all other things within Wales ſhall be determined be- " fore the ſteward of the lords of Wales, unleſs it be of land between the lords."

32 H. 6. 25. Debt againſt two executors; plea, that teſtator made them and one I. executors which I adminiſtered at D:in biſhopric of Durham, and is now living, but not named in the writ. P. replies, *I. did not adminiſter.*—Iſſue joined. Adjourned into exchequer-chamber, to know how to try this iſſue. FORTESCUE.—"In your caſe, if ſuch foreign pleas ſhould be alledged in " Wales or in Ireland, I underſtand they are good pleas: but in theſe caſes it ſhall be tried " where the writ is brought by the common law; for theſe lands were never ruled according " to the courſe of the common law of England. At ſome time Cheſter, Lancaſter, and Dur- " ham, were at common law: and although the king has made them counties palatine, as he " well may without parliament, yet the king without parliament cannot *prendre ſon lige home* " *de droit*; for the plea pleaded in the county palatine ſhall be inconvenient to be tried where " the writ is brought, becauſe that within the county palatine there are divers courts, which " have divers powers to try ſuch iſſue, and they ought in ſuch caſes to obey the king's writ; " and ſo they have done; as in caſe that one of county palatine is vouched in common place, " then the parol ſhall be ſent thither; and when it is determined there, then it ſhall be re- " manded here. But no proceſs can be made, nor ever was made, to Wales or to Ireland, " notwithſtanding they are under the king's obeiſance."—And this not denied.—FORTESCUE " gave the rule. It ſeems to us all, that it is more convenient that this matter pleaded ſhall be " tried in the county palatine of Durham, and after ſent thither."

36 H. 6. 33. In aſſize tenant made title, and demandant pleaded recovery. In anſwer, te- nant ſaid, four acres were in the five ports.—Adjourned into the exchequer chamber. FOR- TESCUE, Ch. Juſt. B. R. gave the rule, and awarded aſſiſe of remainder. "There are," ſays he, "divers manners of franchiſes.—One in Wales, where the king's writ runs not; " for if *præcipe quòd reddat* is brought here of land in Wales, if recovery is had of this, it is " void, and, *coram non juſtice*; for it is not parcel of the realm of England; and therefore this " court has no juriſdiction there, unleſs it be of advowſons, for a *quare impedit* ſhall be brought " here of churches in Wales, and ſhall be ſued in the county adjoining, becauſe that the *juſtices* " will not obey any man there. Another franchiſe in county palatine, as Durham or Cheſter, " which is of another nature than Wales is; for if one vouches to warranty another in Cheſter, " *ſummoneas ad auxiliandum* ſhall not iſſue in the county palatine, but a ſpecial writ ſhall iſſue to " the lord of the franchiſe to make proclamation to her or him, &c. by this means a judg- " ment ſhall be had to recover in value here of land within county palatine, and ſo it cannot " be of land in Wales.—Another is of ancient demeſne. If action is brought in this court of " land in ancient demeſne, and judgment had, upon this the land is become frank free, and " the recovery is ſufficient enough, and of ſuch recovery the lord of ancient demeſne may have " writ of deceit to recover back his ſeignory, and ſuch franchiſe purſues the tenancy.—Ano- " ther franchiſe is the five ports; and if action is brought of land in the five ports, and judg- " ment had upon this, the recovery is ſufficient enough to my intent, and ſhall not be defeated " by writ of deceit; and yet at another time it ſhall not be impleadable, if exception ſhall be " taken of this in another action, for it is like the caſe of conuſance," &c. And afterwards he " ſays, "that one franchiſe claimed in five ports is, that if any miniſter of the king comes with- " in the franchiſe to aſſiſt any man, his head ſhall be broken."

2 E. 2. Oblig. 15. Debt upon obligation made at Berwick; and becauſe it was made at Ber- wick, where this court has no conuſance, it was awarded that he ſhould take nothing by his writ.

Hale's Prerog. 23. The prince within his principality, and the lords marchers within their lordſhips, had *jura regalia* †.

* So is the year-book referred to; but it ſeems an error, and that it ſhould be *biſhops* inſtead of *juſtices*.—EDITOR.

† Here follow in the manuſcript ſeveral paſſages continuing the extract from Lord Hale's Trea- tiſe on the Prerogative; but as they are chiefly in ſhort-hand, I could not decypher them. —EDITOR.

Under this laſt caſe theſe things are worthy obſervation.

1. That the caſes put on both ſides ſeem to be good law, and are uncontradicted; for the council do not differ about the caſes themſelves, but only in the inferences drawn from them.

2. That whereas the point to be eſtabliſhed on one ſide, was, in general, that the king's courts had juriſdiction in Wales, the caſes brought to maintain it are caſes in the marches only, and none in the principality.

Brooke, title *Cinque Ports* and *County Palatine* 8. in abridging the caſe of 19 H. 6. 22. writes in margent, *Nota* Forteſcue; and after giving the caſe, obſerves, "It "ſeems "they "would "have ad- "judged "the caſe, "if it had "not been "for New- "ton's o- "pinion; "for all "were "againſt "him, and "*lex con-* "*tra* New- "ton, *ut* "*mihi vi-* "*detur*."

3. That the law is, and always has been, as Forteſcue and his ſide contended; and no inſtance can be given where a foreign plea of this kind, ariſing within the county palatine, has been tried in the county adjoining.

4. We may obſerve from hence a very material difference between the lordſhips marches and the counties palatine, in theſe particulars:

1. The writ of error did not lie from the marches to the king's-bench, but did from the county palatine.

2. If foreign plea or voucher ariſing in the county palatine was pleaded in the king's courts, the record was ſent into the county to be tried, and afterwards returned into the king's court for judgment. But in Wales the record in theſe caſes went no further than in the adjoining county. And this difference aroſe from hence, that the counties palatine were parcel of the realm, and derived originally out of the crown of England, but Wales never was.

To conclude this head, I will cite lord Coke's comment upon *cap.* 12. of *Magna Charta* upon theſe words, that aſſizes ſhall not be taken but *in ſuis comitatibus.* 2 Inſt. 25.

"Yet in ſome caſe, notwithſtanding this negative ſtatute, the "aſſizes ſhould not have been taken in his proper county. And "therefore if a man be diſſeiſed of acommote or lordſhip marcher in Wales holden of the king *in capite*, as for example of "Gowre, the writ of aſſize ſhould have been directed to the "ſheriff of Glouceſter within the realm of England; and albeit "the land of Gowre was out of the power of the ſheriff of Glouceſter, being out of his county, within the dominion of "Wales, and this ſtatute ſays the aſſize ſhall not be taken but "in his proper county; yet was the aſſize taken in the county "of Glouceſter, and judgment thereupon given and affirmed "in a writ of error. And *the reaſon is notable*; for the lord "marcher, though he had *jura regalia*, yet could not do juſtice in his own caſe; and if he ſhould not have remedy in this "caſe by the king's writ, he ſhould have right, and no remedy "by law given for the wrong done unto him, which the law will "not ſuffer."

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Hale's Prerog. 460. *Habeas corpus* lies into Wales, five ports, London, or county palatine; and this often reſolved, partly in reſpect of the intereſt the king has in his ſubject, partly in reſpect there is no other means to examine whether his commitment be legal.

The caſe, here alluded to, is the caſe of 18 E. 2. before cited, and is in Fitz. Aſs. 382. But lord Coke takes no notice of the act of parliament there mentioned.

Thus have I brought down the hiſtory of the Welſh juriſdiction in the ſhires and marches to the time of H. 8. when the ſtatute of union was made; during all which time it is as clear as the ſun,—that Wales was not parcel of the realm of England: —that it was ruled and ordered by its own laws and cuſtoms, independent of the realm of England:—that the king's courts at Weſtminſter aſſumed no juriſdiction over it, except in thoſe few caſes mentioned, and that only in the marches; and that theſe exceptions do all of them prove the generality of that rule, that the king's writ runs not into Wales in all other caſes whatſoever: —laſtly, that the king's courts at Weſtminſter exerciſed no juriſdiction in the ſhires, either concurrent or ſuperintendant; but the king's juſtices there were equal in dignity and power with the juſtices here, and abſolutely independent of them.

I have been the longer upon this part of the caſe, becauſe Mr. Evans in his argument took it for granted, that Wales had always been part of this realm, which was moſt ignorantly advanced, and without any ſhadow of authority or argument to ſupport it; and on this groundleſs aſſertion concluding that the king's-bench always had juriſdiction there, he preſently applied that known rule, that the juriſdiction of the king can never be taken away without expreſs words, to this caſe of Wales. But if the king's-bench never had juriſdiction there, as in truth it never had, then this rule is miſapplied, and the argument drawn from ſuch application fails in its very foundation. Now that the king's bench had no ſuch juriſdiction before the 27 H. 8. has been ſufficiently proved.

The next thing to be conſidered is, whether this ſtatute or any other has given this juriſdiction to the king's-bench. And here I beg leave to reverſe the argument, and demand of them by what *expreſs words* they claim this juriſdiction. If they ever had it, I will allow them the benefit of their favourite maxim, but it ſhall not be wreſted from them without *expreſs words*. Otherwiſe this rule is nothing to the purpoſe.

But to proceed:

The 27 H. 8. c. 26. unites Wales to the realm of England.—From this time I confeſs it became part of the ſame realm; but all the conſequence that followed from hence, if no more had been done, would have been, that from that time all acts of parliament made in England would have bound Wales without naming

naming it; but as for laws and juriſdictions, they would have remained as they did before.

In the next place, all Welſhmen are made inheritable to the laws and cuſtoms of England.—Upon this I muſt obſerve, that the laws and cuſtoms of a country, and the authority by which thoſe laws are executed, (which I call juriſdiction) are two very different things; for although it is very true the word *laws* may without any impropriety be uſed in a large ſenſe to comprehend both, yet every body ſees, that in many caſes they are two diſtinct things, and muſt be conſidered ſeparately: for as, where it is ſaid the power of making *laws* is veſted in the three eſtates of the kingdom, the word *laws* can never include that law which gives the legiſlative power; ſo where the king and his miniſters are called the executors of the *laws*, the law by which the king and his miniſters execute all other laws can never be comprehended under thoſe laws which are ſo executed. The uſe I make of this is to ſhew that the laws of England, introduced by this ſtatute into Wales, were the laws in this reſtrained ſenſe; and that they did not touch in any degree the execution, power, or juriſdiction. And that it may not be ſaid that this is a mere nicety of my own invention, I will cite the 10th ſection of the act at length to prove it.

"And that juſtice ſhall be miniſtered, uſed, exerciſed, and executed unto the king's ſubjects in the *ſaid ſhires* of Brecknock, Radnor, Montgomery, and Denbigh, according to the laws and ſtatutes of this realm of England, and according to ſuch other cuſtoms and laws now uſed in Wales aforeſaid, as the king our ſovereign lord and his moſt honourable council ſhall allow and think expedient, requiſite, and neceſſary, by ſuch *juſtice* or *juſtices*, as ſhall be thereunto appointed by our ſovereign lord the king, and after ſuch *form and faſhion as juſtice is uſed and exerciſed* to the king's ſubjects within the three ſhires of North-Wales."

The *ſaid ſhires* in this ſection were the new-created Welſh ſhires.

If it ſhould be aſked, now, by what laws under this ſection ſhall Wales be governed? the anſwer is clear: By the laws and ſtatutes of England.—If it ſhould be aſked further, by whom ſhall theſe laws be adminiſtered? By the king's juſticiary.—After what form and faſhion? After the ſame as is uſed in the three ſhires of North-Wales.

Theſe ſhires of North-Wales were, as I have obſerved, the laſt remnant of the dominions belonging to the old princes of Wales. They were governed by the king's juſtice under the directions of the ſtatute of Snowdon; and not lying, as it ſeems, ſo much expoſed to

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the neighbourhood of the Lordſhips marchers as the other ſhires, had not been infected with that riotous diſpoſition which the inhabitants of the marches had contracted; for it is natural to ſuppoſe, that the claſhing rights of ſo many petty ſovereigns bordering upon each other, muſt have produced infinite tumults and diſorders. Accordingly, I find a clauſe of this very act to preſerve the laudable *laws, uſages, and cuſtoms* in theſe three ſhires*; and, in an act made the year before to make all offences in the marches and other places of Wales triable in the next Engliſh county, there is a ſection to † empower the juſtices of North Wales to try all crimes committed in the county of Merioneth, in the counties of Caernarvon or Angleſea. It ſeems Merioneth lay more open to the marches; for Caernarvon, as I take it, was well defended from them by difficult mountains hard of acceſs.

This is a mere conjecture, and I will not vouch for the truth of it.

But, be this as it may, the new government, erected in thoſe ſhires made out of the marches, is referred by this act to the form and faſhion uſed in North Wales. This was to be their pattern. If it be now aſked what that was? It has already been deſcribed, and need not be repeated. By this act the *form and faſhion* of adminiſtering the laws there continued the ſame. No new juſtices are appointed there, no juriſdiction erected, no new forms of proceeding eſtabliſhed. Nay, the laws, uſages, and cuſtoms are ſacred, by an expreſs clauſe made in their favour; and to the adminiſtration of juſtice there, are all the counties of Wales referred, as to their ſtandard.

What ſhall we ſay then to this pretended right of the king's-bench? Where can it be found? To what purpoſe will it be for them to harp upon that old rule, that their court is not to be ouſted of their juriſdiction without negative words, when they never had any juriſdiction there of which they could be ouſted. 'Tis as much, as if a man ſhould complain of a thief robbing him of what he never had. Let them ſhew but one inſtant of time, wherein they were ſeized of this right, and the point is given up. And yet this argument is the main pillar and ſupport of their pretenſions; ſo that the chief juſtice upon the laſt argument, after having heard both ſides with great attention, did at laſt with wonderful gravity and compoſure of countenance let fall this ſentence, "It will be hard to ouſt this court of its juriſdiction without expreſs words."

But to make the point clearer, I will collect the clauſes and proviſions in the act together, as they follow each other in order: ſo that the deſign and intention of the whole may be ſeen, as far as it relates to this queſtion.

* Sect. 31 of 27 H. 8. c. 26.—EDITOR.
† Sect. 12 of 26 H. 8. c. 6.—EDITOR.

Firſt,

Firſt, Wales is incorporated with England, and made part of this realm.

Secondly, all perſons born in Wales are entitled to the enjoyment of the privileges and laws of England.

Then the marches are cantoned out, and made into counties. And firſt the county of Monmouth is created and made an Engliſh county; Monmouth is the county town, and the ſeſſions of the peace are to be held there. What follows? Is there any thing wanting? Yes; it is neceſſary to ſettle the form of proceeding; that had not been provided for.

The act then proceeds to enumerate many particulars very minutely.

All actions, real, perſonal, or mixed, "ſhall be ſued by original writ of the king's high court of chancery in England, "and heard and determined before the king's juſtices of aſſiſe, "and *niſi prius*."

"The king's juſtices of his bench, or common bench at "Weſtminſter, ſhall have full power and authority to direct all "manner of proceſs to the ſheriff and all other officers of the "ſaid county; and to direct writs of *venire facias*, and award "commiſſions of *niſi prius*."

The ſheriff of the ſaid county ſhall hold writs of replevin, and all other ſuits and plaints under forty ſhillings.

The ſubjects and inhabitants ſhall be obedient and attendant to the lord chancellor of England, the king's juſtices, and others the king's moſt honourable council.

The ſheriffs, eſcheators, and coroners, ſhall be bound to execute all proceſs, and make due returns thereof.

Here I allow, that the king's-bench may ſhew *expreſs* words for their juriſdiction. The grant is full and clear. But the particular care in penning this clauſe ſeems to intimate very ſtrongly, that the juriſdiction *before* was the reverſe of what is enacted *now*; that no writs iſſued out of the chancery; that no cauſes were heard or determined by the juſtices of the aſſize; that the juſtices at Weſtminſter had no power to direct proceſs there; that there no *venires*, no commiſſions of *niſi prius* ran; that the inhabitants were not obedient to the chancellor or judge; and that the eſcheators, and other officers there, were not bound to execute any of their writs.

The ſtatute goes on, and enacts what ſhall be the county of Brecknock, makes that the county town, and appoints the county court to be held there; and then the counties of Radnor, Montgomery and Denbigh are made in the ſame manner.

What

What is to be done next? Shall theſe, which are not made Engliſh counties, be thrown under the Engliſh juriſdiction, like the county of Monmouth? Shall the chancellor and judges ſend their writs, and award their proceſs here, as in Monmouth? No. By ſect. 9. "for as much as the inhabitants of the ſaid ſhires of "Brecknock, Radnor, Montgomery and Denbigh, be not of "ſubſtance, power and ability to travel out of their countries to "ſeek the adminiſtration of juſtice at London," the ſtatute gives each of them a chancery and exchequer. What elſe? According to ſect. 10. the king will appoint juſtices for each court, and they ſhall adminiſter juſtice in the ſame form and faſhion as is uſed within the ſhires of *North Wales*.

After this, other marches are added ſeverally to the ſhires of Glamorgan, Carmarthen, Pembroke and Cardigan, with the like reference to *North Wales*. But as to North Wales itſelf, not one ſingle ſyllable is ſaid in relation to the juriſdiction; but the ſtatute has left it where it found it. Only the laws and cuſtoms of that part of Wales are ſaved by a particular clauſe.

Will any man now ſay, that the king's-bench under this act has gained one foot of ground in Wales, except the county of Monmouth? That indeed is made an Engliſh county.—The parliament thought they had made but one. But they are miſtaken; all the other twelve are Engliſh counties; and it is in vain, that the legiſlature has taken ſuch pains to give theſe poor men juſtice at their own homes; the courts at Weſtminſter will drag them up to town barefoot, as they have done already by the Cheſhire men.—But to be ſerious, there is not, that I can find, one word in this ſtatute which can yield an argument in favour of this claim; but the whole frame, deſign, and end of it, prove, as far as I can judge, the very reverſe. And altho' the Engliſh laws and uſages are introduced into Wales, and that country is made part of the realm, yet the independent and excluſive juriſdiction is kept upon the ſame footing it was before; nay, as lord Vaughan obſerves †, the Engliſh courts by this act loſt what they poſſeſſed before; for, as the power of the marches was deſtroyed, that neceſſity, which gave occaſion to the king's courts to interfere before, ceaſed now, and conſequently the diſputes between the lords, and *quare impedits* returned home to their former juriſdiction.

All this pains has been taken for the ſake of anſwering an argument in the caſe of Stradling and Morgan, Plowd. 207. which is this:

"Foraſmuch as by the ſtatute of 27 H. 8. Wales was united "to England, and all was made one realm, for this reaſon ac"tions upon ſtatutes ariſing upon cauſes there, might before the "ſaid ſtatute of 34 and 35 of H. 8. have been ſued in the king's

† Vaughan 417.—EDITOR.

"courts

" courts at Weſtminſter. And the ſaid clauſe in the ſaid ordi-
" nance made in the 34 and 35 H. 8. being ſpoken affirma-
" tively, ſhall not take away the juriſdiction of other courts."

This argument is put very plauſibly; but the anſwer to it is, that Wales was united by this act, not wholly and abſolutely to the kingdom in all reſpects, but only to ſome purpoſes; viz. to ſend members to parliament, to be ordered by the laws of England, and to be bound for the future by its ſtatutes; but the turn and faſhion of proceeding, together with the juriſdiction, remained, by expreſs proviſion, as they were before.

I would be glad, for inſtance, to be informed whether the writ of error after 27 H. 8. and before the 34 and 35. had altered its courſe, and inſtead of going into parliament went into the king's-bench.—I will defy them to produce any precedent to prove it.—If that had been ſo, what occaſion was there in the ſtatute of the 34 and 35. to make a particular proviſion for this? By the 113th ſection in that ſtatute, writs of error in real and mixed actions are given to the kings-bench; in perſonal, to the preſident and council. By this they gain juriſdiction in error over real and mixed actions, which they never had before. What ſhall we ſay to perſonal actions? The affirmative power of reverſal there, in the preſident, &c. could never have ouſted the king's-bench of their original juriſdiction in that reſpect, if they had been entitled to it before. And yet till this court of the preſident and council was deſtroyed, and a particular clauſe was inſerted in an act of parliament, 1 W. 3. c. 27. to give them power of reverſing error there in perſonal actions, I do not find they ever pretended to exerciſe it.

Again, by the 34 and 35 H. 8 ſect. 89. if a foreign plea or voucher ariſing in England be pleaded in Wales, it ſhall be tried where the action is brought. Theſe words are affirmative only, and by the ordinary juriſdiction of the king's-bench, they can in theſe caſes remove the record before them to try the plea. This they have always done in the counties palatine; nay, as NEWTON ſays, they might have done this in the marches. Can they produce one book, caſe, or record, to prove they have ever done this in Wales ſince the ſtatute?—I am ſure, at leaſt, I can find none ſuch.

If then the king's courts at Weſtminſter had gained poſſeſſion of no juriſdiction over Wales by 27 H. 8. the counſel in Plowden admit, that the 34 of H. 8. could give none: and they were certainly right; for if they got nothing by the union in the firſt ſtatute, the ſecond, which eſtabliſhed a full and perfect juriſdiction in other perſons and in other courts, could never mean to grant them any privilege. This laſt ſtatute erects the court of grand ſeſſions; appoints the time for holding them; diſtributes the twelve counties to their ſeveral juſtices, allotting

allotting three ſhires to each commiſſion; and then grants to theſe juſtices powers to hold pleas, powers as large, as full, as unconfined, in all matters criminal and civil, as the king's courts at Weſtminſter hold and enjoy. Vid. f. 4. and 13. And I have no doubt at all but that if the act had been ſilent as to error, that writ muſt have gone directly into parliament, as it did before for the reaſon NEWTON gave, becauſe theſe courts were as high as any other of the king's courts. From hence appears the impropriety of comparing Wales with the counties palatine.—Wales is no franchiſe, nor ever was; never under the controul of the king's-bench as an inferior court, but is equal to it in all points of power, as well as dignity.

But there is a clauſe it ſeems in this laſt ſtatute, which, Mr. Evans ſays, puts this matter out of diſpute; and that is, f. 115. "that all proceſs for urgent and weighty cauſes ſhall be directed "into Wales by the ſpecial commandment of the chancellor of "England, or any of the king's council in England, as heretofore has been uſed."

One ſhould be at a loſs to find out, by what logick, or rather magick, this clauſe, which ſeems at firſt ſight to afford a very ſtrong and preſſing argument againſt the juriſdiction of the king's bench, could be converted into an argument in favour of it.—Thus then it was done:

Urgent and weighty cauſes are to ſignify *all cauſes*, and *the king's council in England* are to ſignify *the judges*, and then the conſequence is clear. *The judges* are declared by the act to have ſent proceſs into Wales *in all cauſes* heretofore, and the ſame power is reſerved to them in all *caſes hereafter*. And all this is very true, and is much ſuch reaſoning as this; that if darkneſs ſhall be made to ſignify light, the ſun would be the darkeſt body in the univerſe. This is ſo poor an argument, it is below all ſophiſtry. I ſcarce know where I ſhall begin to refute it, and from the beginning to the end it is one heap of ignorance and abſurdity.

In the firſt place, that urgent and weighty cauſes cannot mean cauſes that are not urgent and weighty, I am even aſhamed to prove.

In the next, it is not true, that the king's council here does mean the judges, or that the judges ever were at that time called by that name.

And laſtly, if both theſe explanations were right as they were wrong, the declaration of the act as to the uſage heretofore would have been abſolutely falſe.

The firſt of theſe proves itſelf, and the laſt has been already very ſufficiently made out in the former part of this argument.

As to the ſecond, that the *king's council* does not in this place mean the *judges*, I ſhall take up a little more time in explaining this;

this; for altho' it is clear enough, that the great cauſes here reſerved to the council have nothing to do with petty actions in the king's bench, and it would be ſufficient for the preſent purpoſe to ſhew negatively what cauſes they are not, yet it is not ſo eaſy to make out what they are. The difficulty ariſes from hence, that the council do not at preſent exerciſe any juriſdiction over Wales; nor, as far as appears in our books, ever have done ſince the ſtatute, notwithſtanding this clauſe remains unrepealed to this time. Nor on the other hand have the king's judges (except the court of exchequer, which ſtands not upon this foundation) in fact ever held plea in great and weighty cauſes under this clauſe, from that day to this. And yet it is impoſſible to conceive the legiſlature meant nothing by this reſervation. This matter is, I confeſs, involved in ſome obſcurity; and yet I do not deſpair of giving a reaſonable interpretation of it.

In the firſt place it muſt be underſtood, that theſe words *the council* are uſed ſo promiſcuouſly in the old records, that it is quite impoſſible to give them any definite meaning. Sometimes they ſtand for the king's ordinary council, which conſiſted of all the great officers of the kingdom with the judges. In other places they are uſed to ſignify the privy council only, of which too the judges or ſome of them were a part. Sometimes the ordinary council joined to the houſe of lords were called by this name. Sometimes the houſe of lords alone, and very frequently the whole parliament, are intitled the king's council. Nay, I find one old book-caſe, where the judges are called the council. 30 Aſſ. p. 38. In ſhort, ſo great is the confuſion in the old records from this promiſcuous uſe of the word *council*, that my lord Hale can give no other rule to aſcertain its meaning but the ſubject matter of the record itſelf.

But tho' the records of former times are ſomewhat perplexed by this uncertain uſe of this term, latter ages are more correct. Powers and juriſdictions came in proceſs of time to be better ſettled, and words uſed with greater propriety. The ordinary council was ſunk on the erection of the ſtar-chamber, which yet retains its old name of the king's council; the lords, commons, and judges, came to be called by their proper names; and the only council left in H. 8's time and Mary's reign before was the privy council, ſuch as it remains even to this day, and the ſtar-chamber which was ſometimes called by this name; and I believe I might challenge any one to ſhew a ſingle inſtance, from fifty years before the reign of H. 8. to the preſent time, where the council has ever been uſed to deſcribe any body of men

but

but the privy-council or the ſtar-chamber. So much for the meaning of this term.

A word now of the power and juriſdiction of the king's council.—It is to be known then, that the king, as ſupreme lord, oftentimes exerciſed an extraordinary juriſdiction in great cauſes over all the palatine earls, and lords marchers; and, when the matter was of ſufficient importance, held plea originally, and heard the cauſe ſometimes in parliament, and ſometimes by perſons ſpecially commiſſioned to try that particular cauſe. And this authority in the time of E. 1. was frequently delegated to the judges of the king's bench. The cauſes, which called for this extraordinary cognizance, were generally the riots and tumults of the great barons, who were too powerful to be corrected by the ordinary courſe of juſtice, together with diſputes about juriſdiction, which were generally attended with great diſorders. Many inſtances of theſe are to be met with in Ryley; and I dare ſay the records of thoſe times, if they were looked into, would furniſh many more.

The caſe of William de Valence, the king's uncle, was of this kind.—He, in right of Joan his wife, was earl of Pembroke, and claimed juriſdiction over the lordſhip of Haverfordweſt and ſome other manors, which had been withdrawn from him, as he ſaid, by the late Queen Eleanor, who held the ſignory of Haverfordweſt in common with Roger Mortimer. This moiety coming to the king upon the queen's death, William de Valence preferred a petition in parliament, ſetting forth his right §. *Et ſuper hoc tradita fuit prædicta petitio, per præceptum domini regis, Rogero de Brabazon & ſociis ſuis tenentibus placita ipſius domini regis, ut ibi fieret, quòd de jure & ſecundùm conſuetudinem curiæ fuerit fac.* &c. Here, you ſee, the cauſe in the firſt inſtance was aſſigned to the judges of the king's-bench. The judges upon inſpecting the petition found, that the earl's claim concerned the intereſt of other perſons as well as the king; and therefore, as it was neceſſary to have all theſe perſons before the court, an extraordinary writ iſſued to the conſtable of Haverford to ſummon all the perſons concerned. This writ was returnable *coram nobis ubicunque, &c.* and *teſte R. de Brabazon apud Weſtm.* Do not let any body conclude from hence, that the court of king's-bench proceeded by virtue of their ordinary juriſdiction in this affair. The whole record and the nature of the cauſe itſelf proves the contrary. The parties appeared and pleaded; and upon iſſue joined, writs of *venire fac.*, iſſued to the juſtice of Weſt Wales, to the biſhop of St. David's ſteward, to the ſheriff of Pembroke, and to the conſtable of Ha-

§ This petition is in Ryl. Plac. Parl. 211.—EDITOR.

verford,

verford, to return each of them twelve men to try the iſſue, *quia prædict. Will. & Johanna poſuerunt & conſenſerunt, quòd inquiſitio præd. caperetur per homines de partibus prædictis.* Obſerve, that the parties come in and plead inſtantly to the general petition. Indeed the whole proceeding is unuſual, and contrary to the common courſe; and it is certain, that the king's bench could neither have ſent their writs into Wales, nor ſummoned ſuch a jury, but by virtue of the king's extraordinary juriſdiction delegated to them, nor, as it ſhould ſeem by the entry, without the petitioner's conſent. See Ryley 211.

The caſe of Theobald de Verdun, lord of Ewyas de Lacy, a Welſh merchant, is ſtill more material to this purpoſe. He being arraigned at Bergavenny *coram rege & concilio* of divers treſpaſſes and contempts *in læſionem coronæ, &c. in inquiſitionem patriæ ſe inde poſuit.* Upon this, as it ſeems, Theobald de Verdun pleaded to iſſue *coram ipſo domino rege & concilio,* which I ſuppoſe was in parliament, and then the record was delivered to the judges of the king's-bench to be tried. *Et ſciend. eſt, quid per judicium in prædicto placito poſtea coram ipſo domino rege apud parliament. &c. redditum, prædict. Theobaldus per conſiderationem & judicium totius concilii committebatur gaolæ,* and his liberty ſeized. Ry. p. 98. Thus the court of king's-bench tried the iſſue, but the pleadings and judgment were in parliament; which is very ſtrong to ſhew, that the court did not in thoſe caſes proceed by virtue of their ordinary juriſdiction.—The great caſe between the earls of Glouceſter and Hereford, Ry. 74. is of the ſame kind, and is to be found in the records of the king's-bench, as well as upon the parliament roll.

In the caſe of William de Breouſe abovementioned, William de Wogan, William Mortimer, and Walter Hacklut, are aſſigned to try the iſſue, and return the whole into parliament, together with other proceedings, which had been had againſt the ſaid William de Breouſe *coram auditoribus Johanne de Haverynge, Willielmo Inge, Rogero de Southcote, et Waltero de Pederton,* which auditors were commanded to tranſmit their record to J. Wogan and his companions; wherein it is to be obſerved, that neither Wogan and his companions, nor any of the ſaid auditors, were judges.

Upon theſe caſes I muſt obſerve, that where the ſuit was commenced in parliament, and the iſſue ſent to the juſtices of the king's-bench to be tried, they did not proceed by virtue of their own authority, and conſequently ſuch precedents cannot be of any force to eſtabliſh an ordinary juriſdiction. Therefore it is a good rule, that where the ſubject matter of the cauſe is not

not properly within the cognizance of that court, the mere trial of parliament-iſſues will not give it original juriſdiction in like caſes.

To return to the council.—Theſe great cauſes, after trials in parliament grew out of uſe, came to be determined by the king in council, or ſuch particular perſons as he aſſigned for that purpoſe; and hence aroſe, as I gueſs, that great court of the council and preſident of Wales, which was inſtituted to keep the lordſhips marchers in order, and to exerciſe as the king's vicegerents his ſovereign juriſdiction over theſe ſturdy ſubjects. And thus having gotten ſome footing in criminal matters, they, as the faſhion is of moſt courts, began preſently to enlarge their bounds, and without the help of a *Latitat* thruſt themſelves into all civil cauſes. So that I find in the time of James the firſt, 1 Roll. Rep. upon a motion for a prohibition there, the judges allow them to hold plea in all actions at common law, as debt and treſpaſs upon the caſe under fifty pounds, in all cauſes of equity, and in all criminal cauſes. When this court was erected, or by what power, is uncertain; not by act of parliament, and therefore it ſhould ſeem by the king's ſole authority: and let the advocates for the king's-bench conſider, that if Wales had always been part of this realm, and under their power, how conſonant it was to the laws and privileges of this kingdom to ſuffer ſuch a court to be erected without parliament, eſpecially as, in a like caſe, the preſident's court of the North was created by parliament, and could not have been done any other way.

This court being thus eſtabliſhed, there was but little buſineſs in Wales left to the king and council. Moſt cauſes, except ſome perhaps of the higheſt conſequence, were delegated to the preſident and council of all Wales. In the 34 and 35 H. 8. there is an expreſs ſaving for this court, and the words are, "they ſhall "have full power to hear and determine ſuch cauſes, &c. or "ſuch *as ſhall hereafter be aſſigned to them by the king's majeſty, "as heretofore hath been cuſtomed and uſed.*"

Hence it is manifeſt, that the king hath been uſed heretofore to aſſign many cauſes to the preſident and council. Of what nature theſe cauſes were, I have mentioned before. This at the leaſt the king's-bench may be ſure of; they were ſuch as fell not within their juriſdiction. If they had, this court would preſently have told the king he had no power to aſſign them to any perſon but themſelves. Some cauſes, then, were delegated to the preſident and council: the reſt, which were great and weighty, were retained before the king and council.

Thus

Thus theſe two clauſes ſerve to explain each other, and the council is underſtood in its proper ſenſe, not to mean the king's judges, who, it is plain, had nothing to do in Wales, either in great or ſmall cauſes, except as above; but the privy council, which was the proper judicature for theſe matters, and who retain to this day the traces of ſuch a juriſdiction in plantation cauſes, and in the iſles of Jerſey and Guernſey.—To this I ſhall add a very good political reaſon, why this reſervation of great and weighty cauſes to the council was extremely proper, and almoſt neceſſary at that time. For if you conſider, that by theſe acts of union the power of the lords marchers were totally deſtroyed, and that theſe great men, from being in ſome ſort ſovereign princes, were reduced all at once to private ſubjects, there was great reaſon to apprehend this alteration might be attended with tumults and inſurrection; and therefore it was very fit, that the king ſhould reſerve to himſelf the hearing and determining of theſe offences, and not leave them to be tried by the common juries, or the inſufficient authority of the preſident and council. In reality, no ſuch diſturbance followed; and therefore, as it ſeems, the council had no occaſion to exerciſe this extraordinary juriſdiction, but all matters fell by degrees under the government of the lord preſident and council.

To conclude this matter, the king's council are mentioned in other parts of this act; as when power is reſerved to the king and his council to alter and confirm ſuch cuſtoms and uſages in Wales as they thought expedient; in which place it is ſcarce probable, that the judges alone were underſtood by the council. Laſtly, the council is taken notice of in the 27 H. 8. ſ. 4. where they are deſcribed as a body of men, of which the judges made only part; and that is in the clauſe before cited relating to Monmouth, "which directs, that the king's ſubjects within that county "ſhall be obedient to *the lord chancellor* of England, the king's "juſtices, *and others of the king's moſt honourable council.*"

Let any one judge now, whether Mr. Evans had not better have been ſilent upon this clauſe: for admitting the king's council to be the judges, this affirmative authority given to them, in urgent and weighty cauſes, does imply a ſtrong and neceſſary negative, that it ſhall be exerciſed in none other but *ſuch urgent and weighty cauſes*; and tho' he ſhould talk till domeſday, he will never be able to perſuade a man of common underſtanding, that an action of treſpaſs for taking and carrying away goods of the value, &c. is one of theſe *urgent and weighty cauſes.*—Thus does this clauſe retorted upon him yield an unanſwerable argument againſt the juriſdiction.

Thus

Thus ſtands this caſe upon thoſe two famous ſtatutes of H. 8. —There is yet further evidence behind.—There is the expreſs declaration of the act of parliament, 1 E. 6. c. 10. that the king's writ neither had nor could run into Wales: nay, not only a declaration, but an actual proviſion made, in the enacting part, to cure the inconvenience which was occaſioned by this excluſive privilege. For this act, acknowledging the law to be as I have ſaid, declares, that for the future proclamations upon the exigent ſhould have curreney in Cheſter and the Welſh counties; whereas, before, the writ could get no further than the adjoining county. For this purpoſe it was neceſſary to order, and accordingly it is ordered, that, for the future, the ſheriffs of all the ſaid counties ſhould appoint deputies in each of the king's courts for this purpoſe; and there is a ſaving clauſe to ſave all other liberties in Wales and the ſaid county of Cheſter.—The 5 Eliz. c. 23. is a teſtimony of the ſame kind; for this act, likewiſe reciting in the ſame manner that the queen's writ runs not into Wales or the counties palatine, and that a capias is not returnable from thence into the court of king's-bench, provides, that the writ of *de excommunicato capiendo* upon a *ſignificavit* out of chancery ſhall go into theſe counties for the future.—Theſe ſtatutes are full and poſitive; not mere recitals (tho' even they, in a caſe of this kind, would have their weight) but full and compleat laws, founded upon no other motive, and vain and impertinent in any other light.

This is not all. The firſt ſtatute, that of the 1 of E. 6. provided only for Wales and Cheſter; and therefore in the 5 and 6 E. 6. another ſtatute * was made to take in Lancaſter: nay, 31 of Eliz. near forty years after, there was another ſtatute † to provide for Durham; and both theſe make the ſame declaration.

Conſider now the force of this evidence.—On the one ſide, the legiſlature for above forty years together declare and aſſert, that the king's writ did not run either into Wales or the counties palatine, ſpeak of it as an inconvenience in particular caſes, and make ſeveral laws to redreſs the miſchief. On the other, from the 34 of H. 8. to this day, except ſome very modern inſtances, there is not one ſingle caſe that affirms it does.

But this argument, as ſtrong as it may ſeem, has one unlucky defect in it; and that is, it has been already overuled, by the preſent chief juſtice and the court of king's-bench in the caſe of Chapman and Maddiſon ‡, a county palatine cauſe. Paſch. 11

* Cap. 26 of 5 and 6 E. 6.—EDITOR.

† 31 Eli. c. 9.—EDITOR.

‡ This caſe is fully reported in Andr. 191. and there is a ſhort note of it in 2 Stra. 1089.—EDITOR.

Geo. 2. The chief juſtice there takes notice of the argument drawn from theſe ſtatutes int his manner: "There were cited," ſays he, "*ſome expreſſions* in the ſtatute 5 Eliz. and other ſtatutes;" and ſome time after he goes on thus: "As to the expreſſions in "theſe acts of parliament, I take their meaning to be, that the "king's writs do not run to the ſheriffs, they not being the "king's officers there."—*Some expreſſions!* as if they had ſlipt in by accident. An error of the clerk ſcarce worth taking notice of! Such ſlight regard does he pay to thoſe four acts of parliament, made with great deliberation; and all concurring in the ſame aſſertion, all concurring in the neceſſity there was of making a law to ſend theſe writs into Wales and the counties palatine, becauſe the courts had no authority to ſend them thither without ſuch a law: and yet all the notice taken of them, is by calling them *ſome expreſſions*. "They ſeem to mean," ſays he, "that "the king's writs do not run to the ſheriffs, *they not being the* "*king's officers there.*" Indeed! Is not the ſheriff in thoſe counties the king's officer? How comes it then to paſs, that he is liable to an attachment for not returning the king's writ? This ſeems to be very hard dealing.—One moment you ſay, the ſheriff is not your officer; and the very next you lay him by the heels for diſobeying the leaſt of your commands.

But let this paſs. His lordſhip admits the writ could not have gone to the ſheriff, *he not being the king's officer there*; and ſo far I agree with him, that moſt certainly it could not. I deſire to know then, who was the king's officer there? Was the biſhop, the earl, or the chancellor? Were they bound to execute the king's writs or no? If they were not, then, for any thing I can ſee, the acts of parliament ſpoke nothing but the truth. If they were, I am at a loſs to find out, for what reaſon theſe acts were made, and where was the inconvenience? What could the legiſlature mean, by ſaying the writ could not go beyond the next adjoining county; and that many perſons had been ruined by this means, becauſe they had no notice of the outlawry, living in theſe exempt places? This was, it ſeems, a mere invention. Perhaps ſo. It is poſſible one act might have been made upon this miſtake. But what ſhall be ſaid to a ſecond, a third, and a fourth, made at conſiderable diſtances of time, all declaring the ſame facts and ordaining the ſame remedy? Thus was this blunder repeated from time to time for near fifty years; and no lawyer in the kingdom could be found to ſet the parliament right in a matter of ſuch conſequence.—But to examine this expoſition a little further. *The king's writ does not run to the ſheriffs, they not being the king's officers there.* The force of this obſervation, if it has any, lies here: the king's writs did run to the lord of the franchiſe before; yet they did not to the ſheriff, inaſmuch

inaſmuch as he was the lord's proper officer, and not the king's; and therefore an act of parliament was neceſſary to ſend the writ immediately to the ſheriff.—Obſerve now, this is a Durham caſe. You expect perhaps, that the 31 Eliz. the act relating to that biſhoprick would have ordered the writ to the ſheriff.—No—Quite otherwiſe:—the act ſends it to the biſhop—This is a blunder of the firſt magnitude. His lordſhip had his eye upon the 1 E. 6. which ſpeaks of Wales and Cheſter; for that act, reciting that the king's writ in this caſe did not run to the ſheriff, enacts, that for the future it ſhall go to him; and forgot the caſe before him, which came out of Durham, and depended upon another act, the 31 Eliz. where the recital and proviſion were different, and not one word was ſaid of the ſheriff throughout the whole, Nay, what is worſe than all, tho' Wales and Cheſter are coupled together in that act, upon which this obſervation is founded, his Lordſhip, fixing his eye too attentively upon Cheſter, took no notice of Wales, where the ſheriffs are the king's immediate officers; which had it been obſerved, would have proved this interpretation to be abſurd and impoſſible. But the truth is, his lordſhip wanted an evaſion; and while he was muſing attentively upon this palatine caſe, Wales ſlipt his notice, and ſo he fell into this expoſition, which is big with as many abſurdities as can be contained in ſo few words.

I have but one thing more to mention, and I have done; and that is, that altho' near two hundred years have paſſed over ſince the 34 and 35 of H. 8. was made, yet till very lately, within this year or two, no ſuch action has been ever brought by any ſuitor, no ſuch juriſdiction ever claimed by this court. This was inforced by the attorney-general *, as indeed was every argument he uſed, with great ſtrength of reaſon. And ſurely it is very ſtrange, that ſuch a right of juriſdiction, if ſuch a right there was, ſhould have laid dormant for ſo many years unheard-of and unexerciſed. In this caſe therefore, if in any, the rule in Littleton, that what has never been done ought not to be done now †, is truly applicable. For conſidering the infinite number of cauſes, where convenience would have tempted the ſuitor or the attorney to have tried their cauſes in the king's-bench; conſidering too that the courts themſelves (which have never, that I have heard of, been negligent in preſerving their juſt rights, but rather faulty on the other ſide, in graſping at more than belonged to them) would have conſtantly encouraged the practice; and though perhaps they could not have poſſeſſed themſelves of the cauſes, would yet from time to time have proclaimed their

* Sir Dudley Ryder.—EDITOR.

† See Littl. ſect. 108.—EDITOR.

right, ſo that either from records of cauſes, or rules in books, this juriſdiction might have been preſerved: yet all this notwithſtanding, there is not one caſe, as I am informed, upon their records to vouch the practice (always excepting a few late inſtances, which go for nothing) nor one *dictum* in their books to eſtabliſh the right; nay, there are ſeveral caſes to contradict it. In a matter that depends upon uſage, every body knows, that modern precedents are the ſame as no precedents. Such uſage muſt be ancient and uninterrupted. By this means old rights may be deſtroyed, and new ones in a courſe of years eſtabliſhed. If no ſuch actual uſage can be ſhewn, yet the memory of it may be recorded in books, or by tradition, and that may ſerve. If that cannot be had, ſtill a right may be preſerved or gained by poſitive laws or maxims laid down in old authors. But if neither cuſtoms nor ſtatute can be produced; if records are totally ſilent, and the ſayings of lawyers ſerve rather to deny than maintain the right; what ſhall be ſaid to thoſe judges, who ſuffer themſelves to be ſwayed by half a dozen modern precedents *ſub ſilentio*, contrary to the practice of all antiquity? I am the more free to complain of this injuſtice; becauſe, under this ſanction of a few late precedents, the judges have intruded themſelves into the palatine counties, and in effect ſtripped them of all their juriſdiction, nay ſtole it from them, by ſuch a low artifice, as would have diſgraced even a pettyfogging attorney. For, whereas they could not, for very ſhame, deny theſe counties to have exempt juriſdiction, and ſo were compelled to admit a plea to the juriſdiction: yet, by declaring *that* to be the only way of bringing back the cauſe, and by ſending attachments againſt the ſheriff for returning the very truth, that the writ does not run there; at the ſame time they admit he is not their officer, they have rendered this exemption vain and ineffectual: for they know very well, that, if the officer ſhould be permitted to nip this action in the bud, their juriſdiction would be preſently at an end; whereas by putting this taſk upon the defendant, and laying him too under difficulties, in ſwearing that he lives within the county palatine, and that he has ſufficient goods there, whereby he may be attached, they ſee plainly, that he will not think it worth his while to remove the cauſe at ſuch hazard and expence to himſelf.

All this iniquity has been eſtabliſhed upon the authority of a few modern precedents, as appears in that caſe of Sumner and Acton, Hil. 1 G. 1. And in the caſe of Chapman and Maddiſon, the chief-juſtice Lee gave a very broad hint to the attornies to furniſh them with ſome ejectment precedents; for after having ſeized all perſonal actions in the counties palatine, as well local as tranſitory, he gave a very ſtrong intimation of his

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deſign upon ejectments, which happen to be mixt actions, and of great conſequence in theſe days, as ſupplying the place of real actions. His words are theſe: "But yet it has been thought "proper in caſe of ejectment to plead to the juriſdiction, and it "was ſo done in the caſe of lady Falconbridge. Trin. 3 G. 2."

I have now gone thro' this caſe with the beſt ſkill I am maſter of, by collecting, from books and records, all the reaſons and arguments which I thought pertinent to this matter; I have endeavoured to ſhew, that the whole dominion and principality of Wales from the time of E. 1. and before to this day, as well before the union as ſince, has always in fact been, and ought ſtill to be accounted out of the juriſdiction of the king's courts of Weſtminſter.

There remain only ſome few objections, which ſhall be taken ſhort notice of, and receive ſuch anſwers as they deſerve.—Theſe objections are arguments ariſing from,

1. Incroachments upon Wales by the court of chancery.
2. Incroachments by the court of exchequer.
3. Incroachments by the king's-bench and common-pleas in ſending proceſs of execution into Wales.
4. Incroachments upon the palatine counties by all the courts.
5. That grand and famous engine of encroachment the *cuſtodia mareſcalli*.

To the firſt and ſecond, I ſhall only ſay, that theſe courts are at preſent, and for a great number of years have been, poſſeſſed of this juriſdiction.—If you aſk how they came by it, and by what right they hold it; I ſhall anſwer, that they now hold it by very good right, even by cuſtom and long acquieſcence. But as to the title by which they firſt ſeized it, I will confeſs frankly I know nothing of the matter: but when you ſhew me the original grant, by which, under the pretence of equity, the court of chancery has ingroſſed all the buſineſs of this kingdom to itſelf, robbing thereby not only all inferior courts, and entering without a *non omittas* into all peculiar juriſdictions; nay, uſurping over the grand uſurper itſelf, the court of king's-bench; I will then undertake to ſhew by what right they ſent their proceſs into Wales originally. In the mean time this ſhall ſerve for an anſwer, and a very ſufficient one it is for this purpoſe: that as tyrannies do in a courſe of time by ſufferance and conſent grow into legitimate monarchies; even ſo the juriſdiction of theſe courts, which had neither law nor uſage to ſupport it, when it firſt began, have now by common conſent and peaceable poſſeſſion for many years acquired both; and if this will be any argument of weight with the preſent king's-bench, it is very certain, that their unlawful uſurpation now will become a good right in their ſucceſſors an hundred years hence. I do not blame them

for

for the *Latitat*, or the exchequer for the *quo minus*. But I muſt ſay, the firſt invention of theſe tricks was neither honeſt nor juſtifiable. However, they are eſtabliſhed and muſt be maintained, no matter how they ſprung; for to endeavour at this time of day to ſhake powers and juriſdictions, by enquiring too minutely into their originals, would breed infinite miſchief and confuſion. Yet if you conſider, by what ſlow degrees thoſe juriſdictions grew, and that at this time it is hard to ſay where they commenced; that they crept ſilently into practice, and were never queſtioned till after they had got the ſanction of ages to ſupport them; you will find thoſe caſes very different from this. The *quo minus* is an ancient prerogative proceſs; and the king's debtor always was privileged for the ſake of the crown to ſue there; the crown always was intitled to ſue in any of its courts, notwithſtanding particular exemptions. Who can ſhew the time when this writ firſt iſſued upon a mere ſurmiſe, or who can tell that man's name who was firſt arreſted by a *Latitat* without having been firſt in the marſhal's cuſtody? If theſe fictions had in their beginnings been oppoſed and withſtood, I cannot think it poſſible, that the judges would have countenanced ſo groſs a falſehood.—So much for this objection, underneath which is contained as ſhameful an argument as ever was uttered in a court of juſtice, and in plain words amounts to no more than this:—We have as good right to do wrong as other courts have, and we will do wrong becauſe they have done it.

The third objection, tho' it furniſhes as much matter of complaint as the former, is as eaſily anſwered; nay, as it happens, affords a very ſtrong argument for the defendant. The practice of ſending executions into Wales was ſettled in the caſe of Whiterong and Blaney, in 2 Mod. 10. and other books; how juſtly, is another queſtion. But in that very caſe the judges were forced to own, that the rule of *breve domini regis non currit in Wallia*, tho' it did not extend to judicial writs of execution, was yet true with reſpect to original writs.—But we are told here, that a *Latitat* is no original writ. I am ſick of theſe quibbles. The judges there, meant original proceſs in oppoſition to execution proceſs; and ſhall this *Latitat*, a fraudulent contrivance to ſteal juriſdiction, a lye from the beginning to the end, enjoy more privilege than the honeſt originals of the common-pleas? But be it an original or not, what buſineſs has it in Wales? The court, in the laſt mentioned caſe, confined their opinion to writs of execution, and none elſe were mentioned; and the only tolerable reaſon then given to ſupport that judgment was the neceſſity of the caſe, to prevent a failure of juſtice; a reaſon, which has nothing to do in the preſent queſtion, for the defendant is reſident in Wales, as appears by the plea, and might as well be ſued at

home

home as in this court. This was excellently urged by the attorney-general; and therefore let the court remember, that in this caſe there is no defect of juſtice.

To the fourth objection, the caſe of the counties palatine, I have already in the courſe of this paper taken frequent notice of the difference between theſe and Wales, and how unapt the compariſon is between them. But if they muſt be compared together, let the court allow the plea; for, that ſuch a plea would be good in a palatine caſe, the court admitted in Chapman and Maddiſon. Conſider further, that the queſtion here is not confined to ſome particular branches of juriſdiction, as it has been in the palatine caſes; it is not whether this court ſhall hold plea in local or tranſitory, in real or perſonal actions; but the whole juriſdiction is at ſtake; for the rule, upon which this claim is to be eſtabliſhed, that the king's-bench is not to be ouſted of juriſdiction without expreſs words, when applied to Wales, will extend to all cauſes, without leaving one ſingle inſtance to be excepted.

Laſtly, we are told the defendant is in the marſhal's cuſtody; and that let him pretend as long as he pleaſes to be reſident in Glamorganſhire, the declaration, which cannot lie, denies the fact, and affirms poſitively that he is here at London in the marſhal's priſon. This being ſo ſuppoſed, the defendant of courſe is beyond the reach of the Welſh juriſdiction; and then you are told with a very grave face, that unleſs this court keeps the plea, there will be a failure of juſtice. Now, that a counſel for his fee ſhould, for want of a better, inſiſt on ſuch an argument as this, I do not ſo much wonder at. But that thoſe grave and reverend men the judges ſhould lay any ſtreſs upon it, is ſcarce credible. And yet in Jennings and Hankyn, Carthew 11. and Davis and Stringer, Carth. 354. which were palatine caſes, this argument as a make-weight is thrown in, and much relied on in the judgment. The attorney-general in the argument called it a fooliſh objection, and gave it no other anſwer. And truly I commend him; for this pretence cuts up all argument by the roots, and will make all pleas to the juriſdiction in all caſes equally impoſſible to be maintained. By this method the *Latitat* may be ſent all over the world; and if you can once lay hold of the defendant and declare againſt him, no matter where this cauſe of action ariſes, he muſt anſwer.

THE

ABUSES AND REMEDIES

OF

CHANCERY.

By Mr. GEORGE NORBURIE.

AND PRESENTED UNTO THE

LORD KEEPER.

[This tract is from a manuſcript in the Britiſh Muſeum. See Harl. MSS. No. 4265. From the contents it appears to have been compoſed in the latter end of the reign of James the firſt, ſoon after the fall of Lord Bacon and the promotion of Biſhop Williams to the great ſeal.]

THE

ABUSES, AND REMEDIES

OF THE

HIGH COURT OF CHANCERY.

TO THE RIGHT HONOURABLE THE LORD KEEPER.

MAY it pleaſe your good lordſhip, now at your firſt advancement to the high place of Lord Keeper of the Great Seal of England, to accept from the hands of a poore clerke of the chancery this ſimple preſent, containing none other than a ſhort diſcourſe of ſome few things, which, in the time I have been trained up and continued in the ſaid court, I have in the practice thereof obſerved. Which I preſume not to offer to your lordſhip, for any confidence I have in the merits of the thing preſented, or of my own ſkill, being the moſt inſufficient of many others; but meerly out of an earneſt deſire I have to do your lordſhip's ſervice: holding myſelf in duty bound thereunto, not only out of the general reſpect that every inferior member oweth unto his head, but out of ſome nearer relation I have unto your lordſhip, by poſſeſſing one of thoſe offices whereof your lordſhip hath the patronage and gift, and which, next under God and the King, chiefly dependeth on your lordſhip's protection.

It cannot be unknown unto you, how this favourable court of ours (which is one of the higheſt courts of the kingdom, and is juſtly termed the ſecret cloſett of his Majeſty's conſcience, where his oppreſſed and diſtreſſed ſubjects hope to find mercy and mitigation againſt the rigour and extremitye of his lawes) hath had many grievous complaints preferred againſt it in the high

high court of parliament, ſome of which have approached even into the preſence of the king; and that many have been ſet on work by the parliament-houſe to diſcourſe and certify what the grounds might be of ſuch complaints, to ſhew they might be redreſſed, amongſt which myſelf was one ſo employed. And accordingly I did certify in writing ſome things, which I thought to be hindrances of the courſe of juſtice, and a grievance unto the people; and the ſame my writing was read both in the upper and lower houſe of parliament. And as then, by commandment, and by virtue of the oathe which I was enjoined to take in the ſaid honourable houſe, I did not only mention ſome few things as they came into memory, which I conceived to be out of ſquare, leaving the reformation of them to their godly wiſdomes; ſoe now I do humbly and voluntarily offer unto your lordſhip's private conſideration the beſt reaſons and motives that my capacity and experience will afford, how a reformation of theſe abuſes may be wrought to them; that, as our gracious king in this parliament-tyme, taking knowledge how burthenſome manie of his graunts were to his loving ſubjects, hath out of his bleſſed diſpoſition annihilated the ſame, and ſoe by one royall proclamation † hath, to his eternal honour, given a more ſpeedy redreſs to thoſe evils then could in a long time have been effected in the parliament; ſoe your lordſhip, by that which ſhall be here opened, and with conferrence of the chief officers of the courte, (men of great experience and integrity, to whoſe judgment and cenſure I ſubmit all that I ſhall deliver) may reform the diſorders of your own court, and eaſe that honourable and high houſe from being any further troubled therewith.

I do remember, that, in the firſt parliament after the happy entrance of our king into this his kingdom, nothing was more complained of, or more troubleſome to the houſe, than the fees at that time taken by the maſters of the chancery; which, tho' the ſaid maſters did not exact of the clyents as a duty, but took what they freely and voluntaryly gave them, yet was it held a grievance to the commonwealth not to be endured. And thereupon, 1 Jac. 1. an act was made, that no man to whom any cauſe was referred out of any of his Majeſty's courts of juſtice ſhould, under a great penalty, take any thing for his report or certificate, directly or indirectly ‡. But in

† See 1 Ruſhw. 36.——Editor.

‡ The act meant is the 1 Jam. 1. c. 10.——Editor.

that

that parliament or ſithence * no courſe was to take them away, or to have their number leſſened. They took away the effect, but not the cauſe.

And what was the ſequel? Verily the parliament was no ſooner ended, but, the buſineſs of the references continuing as amply as ever, the clients for their diſpatch were enforced to give, and the maſters (whoſe laboures were ſtill uſed) were adventurors by the client for that which he voluntarily gave them, and by which he received benefit: and ſoe they continued in the ſame courſe of taking, till Sir Edward Phillips came to be maſter of the rolls, who ſo handled the matter, that references were *è medio ſublatæ*. Inſomuch as I have heard, the lord chancellor himſelf (with whom before that time it was uſual to referr cauſes) upon a motion made unto him that a cauſe might be referred, gave them up for loſt, ſaying, references are now taken away; and ſoe directed another courſe in the buſineſs. Soe as that worthy maſter of the rolls, by his wiſdome and actual performance, did effect more than the parliament could bring to paſs; for let acts of parliament and proclamations, how many and peremptory ſoever, be enacted and promulged, unleſs the cauſe be taken away, ſuch effects will followe, as here before have done, even to the very king and parliament, with continual complaints, ſo as to fill the whole kingdom with combuſtion. And as in the parliament from time to time many excellent lawes are eſtabliſhed for the good government of the commonwealth, ſoe alſo in our court of chancerie many good orders have been made; ſuch as are thoſe lately publiſhed by the lord St. Alban's, which of themſelves, if well obſerved, may ſeem ſufficient for the government of the court; and it were too much bouldneſs and temerity in me to take upon to ſet down any other or better. But the ſcope or drift of what I ſhall now declare is, and of that any other that ſhall travill in this argument ought to be, to ſhew, what the things are, which, notwithſtanding thoſe good directions, have

* In the parliament of the 18th of Jam. r. there was much diſcuſſion about the court of chancery, and more particularly about the maſters, and their fees and other claims. The proceedings on this head in great meaſure originated from the complaints againſt lord chancellor Bacon for corrupt practices, which were naturally followed with inquiries into the ſtate of the court over which he preſided. The conſequence was a beginning of various meaſures, with a view to a reform and new regulation of chancery; and amongſt other ſteps taken for this purpoſe, the commons voted a privy-ſeal obtained by the maſters for fees in references to them a grievance, and appointed a committee for drawing a bill to regulate chancery; after which a bill for adding two aſſiſtant judges to the court, and leſſening the expence of ſuits in it, was brought in and read for the firſt time. But here the buſineſs ſtopped, and the parliament was afterwards diſſolved without any new law on the ſubject.—See Journ. Comm. for 1620 and 1621; and the Debates of the Commons for thoſe two years, but not publiſhed till 1766.—EDITOR.

created

created ſuch charge and vexation unto the people, and clamours againſt the court, and by what means they may be either quite aboliſhed, or at the leaſt ſoe qualified, that from henceforth they become leſs nocive and pernicious. Which, not to detain your lordſhip with tedious circumſtances over-long, I conceive to be principally three:

I. STRAINAGE OF AUTHORITY of the court beyond its limits in matters of judicature.

II. IMPUNITY OF LITIGIOUS PERSONS.

III. DILITORY PROCEEDINGS.

Quibus ſi obviam eatur (as I make no queſtion, by God's aſſiſtance) the court eaſily may be cleared from the imputation layd upon it, and remain, as indeed in its own proper nature it is, a gracious court as any country in the world can enjoy.—And ſoe with your Lordſhip's honourable favour and permiſſion, in all humilitye, I proceed to ſpeak of the things which I have propounded.

I. AUTHORITIES OF THE CHANCERY.

Firſt, it cannot be denied, but that the boundleſs power of the chancery, in not having rules and grounds written and preſcribed unto it in what caſes it ſhall give relief, and in what not, is the cauſe of much diſcontent and diſtraction to the king's ſubjects, and clamours againſt the lord chancellor; for when it is, in *ſcrinio pectoris*, and not in written lawes, whatſoever he ſhall determine will by the one ſide (ever partial in his own cauſe) be thought to proceed out of ſome humour, favour, ſpleene, or corruption. And although, in caſe when the charges ſhall be found trivial (as I doubt not but moſt of them are) the lord chancellor, or judge of the court, being a perſon of eminent place, may eaſily vindicate his honor and reputation from being blemiſhed by ſuch unjuſt proclamations; or if perchance he ſhould at any time erre in giving an unequal ſentence, he cannot want excuſes enough to palliate ſuch his miſdoings, by reaſon that he cannot be charged to have tranſgreſſed any written law, order, or inſtruction, but may anſwer, that he did according to his conſcience, and to the beſt of his underſtanding and knowledge: yet muſt it needs be a great griefe to a good mynd to ſee himſelf ſeated in ſuch a place, wherein it will be very difficult for the moſt ſincere and judicious man living ſo to acquit himſelf, but what occaſions will be taken many times, even *à parte et probabiliter calumniandi.*

Therefore

Therefore it were to be wiſhed both for the good of the judge, and the ſatisfaction of the people, that, ſeeing the ſuits in chancery farr beyond that of former ages are grown ſo frequent, and the court ſo vaſt as it is, that all men ſeem now to have confluence thereunto, on conferrence with the reverend judges of the land, ſome ordinances, rules, and inſtructions were deviſed, if it were poſſible, both for reſtraint of the multiplicitye of idle ſuits there, as alſo for the better directions of the lord chancellor, how to demeſne himſelf in thoſe that ſhall be depending before him; ſeeing the old rule muſt ever hold true, that the common wealth is beſt governed where leaſt is left to the direction of the judge.

And altho' this be a point too high for a mean clerk to level at, I mean to ſhew where relief ſhould be given in the chancery, and where not; yet I beſeech your lordſhip, with patience, to give me leave to relate unto you what I have heard concerning the ſame from mine elders, men of great experience in the proceedings of this court; and what I partly know by my own experience.

Matters properly relieveable in the Chancery.

Touching the affirmative part, what matters are relieveable in the chancery, I have heard they muſt be one of theſe kindes, viz. matters of fraud, truſt, extremity, or caſualty; or elſe not lightly to be dealt in here. For almoſt all others, beſides theſe, do ariſe from the remiſs, careleſs, and negligent dealings of men, who having precipitated themſelves into ſome great inconveniencies come with open mouths into the chancery, ſeeking relief; wherein how far they ſhall be thought fit to be holpen, I will not preſume to determine. Doubtleſs many wiſe men do think it better to ſmart in ſome meaſure for their follies, than that their adverſarys, happily honeſter men then themſelves, ſhould be vext here with a tedious and expenſive ſuit, the court ſo much troubled as it is, and the courſe of honeſt careful and preciſe dealings between man and man ſhould be inverted. For to what purpoſe are bonds made with penalties, leaſes with forfeitures *nomine pœnæ*, and clauſes of re-entry, if the wilful violators ſhall be exempt from all puniſhments, and who will take care to pay either debt or rent? I have heard the late honourable and worthy chancellor lord Elleſmere ſay, that he would not relieve any that forfeited a bond, unleſs it were in caſe of extremity, or that he could make it appear that by ſome accidental means he was occaſioned thereunto; and if he did help any, the party here complain-

complaining ſhould pay all the defendant's charges, both at the common lawe and in chancery, (if he were able) if there was cauſe. Whereas of late much lenity has been uſed to all debtors, ſo that many, after four or five years ſuit and charges in this court, were glad to go away with their principal without either coſts or damages.

Matters not relieveable in Chancery.

And touching the negative part, wherein the court ſhould not relieve, although the nameing of the affirmative excludeth well nigh all others; yet I will give a touch of ſome of them, which by report I have heard are not to be holpen in the chancery; as namely,

All cauſes, wherein the common or civil lawe afford apt remedy.

All matters, that are againſt a ground or maxime of the common lawes, or againſt ſtatute-lawe.

All titles of land, common titles, &c.

Purchaſors or heirs againſt a ſtatute, recognizance, or judgment acknowledged for valuable conſideration; or againſt a woman's dower where ſhe never acknowledged a fine.

A debt without ſpecialty againſt an executor, unleſs it be in very ſpecial caſes.

Leaſes and bargain paroll, verball promiſes, and wills nuncupative.

Promiſes and proteſtations to give or grant any thing contrary to a will or deed in writing, or over and above that which is in the ſaid will or deed contayned.

Averments contrary to a deed or article in writing.

Contracts for procuring of honourous marriages, benefices, offices, &c.

Annuities out of lands againſt a purchaſor or heir, where there was noe attournment.

A lord of a manor againſt his tenant touching cuſtoms or fines.

A ſurety from being lyable to the payment of all the debt, coſts and damages, as far as the principal.

Noe man againſt his own act and deed, promiſe, or covenant, not obtained by fraud, or done in truſt.

And many other things, ſome of which are contained in the laſt lord chancellor's fifteenth ordinances *.

* Lord Bacon's ordinances in chancery are meant.—Editor.

And

And generally this hath been obſerved, that all the ſcandal, that hath riſen to the courte and judges thereof, hath been occaſioned by granting relief to pleaſure friends farther than the ſtile of the court will bear, and thereby alſo to ſhew their authority and greatneſs; which cannot be done but by the great prejudice of others and danger to themſelves, for *quod caret alternâ requie durabile non eſt.* And never or very ſeldom any danger or ſcandal hath grown to the one or the other, by denying relief; for who can juſtly complain, if he be ſent to be tryed by the laws of the realm, againſt the extremity whereof if ſome be relieved, it is upon weightye and important conſiderations, and not to be extended to every wretchleſs and wilful perſon, leſt a wide gate ſhould thereby be opened to all licentiouſneſs?

To inſtance but one of the particulars before remembered, namely, relieveing of ſureties and others by bills of conformity (now, praiſed be God, condemned by his Majeſty's gracious proclamation) what prodigious miſchiefs have enſued thereupon? Even the overthrow of all commerce, and bringing in of jeſuitical equivocation. For a man's bond under hand and ſeal is his oathe, whereby he teſtifieth before all men himſelf *firmiter teneri per ſe pro toto et in ſolido*, which belike was with a mental reſervation not to perform it, but to evade it by a ſuite in chancery; affirming, that he is but a ſurety. True: thou art the butt that was ſhot at: had it not been for thee, the money had not been lent: and if the other faile, thou muſt abide the ſtroake; or elſe Solomon's caveat to take heed of ſuretiſhip could undo or hinder no man, that would but prefer a bill or were able to procure a friend in the chancery.

II. IMPUNITIE OF LITIGIOUS PERSONS.

And touching multiplicity of ſuits, which groweth by being too indulgent to litigious perſons, that order made by the laſt lord chancellor is worthy to be remembered; that ſuch, as have not *probabilem cauſam litigandi*, ſhall pay utmoſt coſts to the party wrongfully moleſted*, which well obſerved will cauſe fewer idle ſuits, and conſequently leſs incumbrance to the court.

Another way to prevent bad ſuits will be, to cauſe every one that commenceth a ſuit here to proſecute the ſame to hearinge,

* See N°. 54. of Lord Bacon's Ordinance.——Editor.

and that by ſuch a tyme, at his peril (except in the mean tyme the parties do agree), or elſe the cauſe to be diſmiſt with coſts. This is the courſe of the common law, whereby the original (which is the firſt proceſs) directed unto the ſheriffs, runnes with this condition: *Si* (the plaintiff) *fecerit te ſecurum de clamore ſuo proſequendo, tunc ſummoneas defendentem, quòd ſit coram juſticiariis noſtris apud Weſtm. tali die, &c.* And there be *plegii proſequendo* upon every declaration; which, tho' they may now become matters of courſe, and no ſuch ſecurity is given in deed, yet it ſheweth, that, *à principio*, the common lawe, which is grounded upon reaſon, did not think it fit, that any man ſhould be ſummoned or troubled, unleſs caution were firſt given to proſecute the ſuite, that ſo the defendant in them might have recompence, if he were unjuſtly vexed. And I have heard, that there is a ſtatute * that noe bill ſhould be preferred in chancery but upon ſecurity firſt put in to prove the ſuggeſtions of the bill, which praieth the lord chancellor to grant him a ſubpœna againſt the defendant. Howſoever it were, the rule aforeſaid will be full as good, by preſcribing either a certain tyme for every plaintiff to procure a hearing in, or that practice of Sir Edward Phillips, who, upon the making of it appear unto him that the plaintiff had neglected proceeding but one half term, uſed to have the cauſe quite out of the court * * * * *

Paucity of good Cauſes.

Moreover it is to be obſerved, that of ten bills brought into this court, hardly three have any colour or ſhadow of juſt complaint. The reſt are found *omni fundamento carere*, and to be exhibited either of malice, or out of a turbulent humour wherewith too many are poſſeſſed, or elſe to ſhelter themſelves for a while from ſome eminent ſtorm. Wherein as many times the remedy proves worſe than the diſeaſe; ſo if they were all forced, as aforeſaid, to come to the touch (that is, to hearing, where their nakedneſs will ſoon appear), and there, if their cauſes be frivolous, were to be well laſhed with coſts, it will make them, and others from their examples, more wary how they trouble their neighbours and the court ſo idly as they do.

For what a miſerable thing is it, that the plaintiff ſhould bring the defendant from the fartheſt part in England to anſwer

* The ſtatute pointed at is 15 H. 6. c. 4. In a note upon a preceding tract, I have had occaſion to expreſs a doubt, whether this is really a ſtatute; and to obſerve that whether it is or not, it has been long unattended to in practice. See before p. 348.——Editor.

an

an idle bill; which done, he will, perhaps, quarrel at ſome part of the anſwer, get it referred to a maſter of the chancery, and conſequently over-ruled for inſufficient; and ſo having vexed and put him to great expences, leave him in the end to wipe his noſe on his ſleeve for any recompence he ſhall get, be the cauſe ever ſo ridiculous!

And as the plaintiff, if he be found to have commenced a cauſeleſs ſuit, is thus to be puniſhed; ſo reaſon doth require, that where the defendant hath kept the plaintiff from his right, with a high hand, either of manifeſt fraud or violent oppreſſion, he is alſo not to be ſpared, but ſeverely puniſhed, and chaſtiſed to the terror of others, by cauſing him to make reſtitution to the full for the wronges that he hath offered.

Objection.—But ſome may ſay unto me, "to give ſuch intimation of ſuch ſtrict courſes to be held with ſuitors in chancery, may be of evil conſequence, in eclipſing the glory and prerogative of the court, and diminiſhing the profits of the officers and clerks thereof, yourſelf being one; and it is an evil bird that defileth his own neſt."

Anſwer.—I anſwer,—If it were ſo, that by fomenting and nouriſhing bad cauſes, ſome profits might accrue unto the officers of the court, yet what are we to the whole kingdom? Ought not our zeal of juſtice and the love of our dear country to be more precious with us than our own private gain? Or ſhall we be ſo degenerate as to think, that this honourable court and the officers thereof cannot ſubſiſt and maintain their flouriſhing eſtate, unleſs they be holpen and ſupported by the ſpoyles and robberys of the people? Farr be it from me ſo to think. Nay, I know the contrary; for when Sir Edward Phillips was maſter of the rolls, no man living, I ſuppoſe, could deviſe more ſtrict courſes for the ſcourging of wrangling ſuitors out of the court, nor execute the ſame with greater dexterity than that worthy man, with whom it was familiar to diſmiſs twenty or thirty cauſes in one day, many of them on their own counſel's motion, and ſo to diſmiſs them that they never ſtirred more. And yet, I dare undertake, the officers of the court will acknowledge, they never gained ſo much as they did in his time. And the reaſon is eaſily rendered; for he ſuffered not his ſheep to run aſtray, and wander into the wilderneſs of endleſs perplexityes; he referred no cauſes; nor gave days to ſhew cauſe, whereby the ſheep are not *tonſæ* only, but *excoriatæ et fere laniatæ*, before their cauſe come to maturitie: but he hooked them to the fould of the court, and there kept them till the day of triall, which was not long delayed; whereby it came to paſs, that whole

multitudes of ſuitors flocked into the court, knowing there was juſtice to be had with expedition. Whereas of late years many are glad *de ſuâ vice decedere* and to ſit down with much injury and oppreſſion, fearing there by ſtirring to be no whitt bettered, or elſe, belike, to be ſmothered amongſt the crowds and throng of ſo many wrangling companions, and their babbling cauſes, ſuch as the court at this preſent hath almoſt noe other.

III. DILITORY PROCEEDINGS.

The third and the laſt is DILITORY PROCEEDINGS, which before I venture to ſpeak of, it behooveth me to ſhew, what the proceedings of the court are, and within what tyme a cauſe by the courſe of the court may come to a public hearing, and conſequently a final determination.

Ordinary Proceedings of the Court.

Firſt, all men know the proceedings of the court to be plain and familiar.

The plaintiff prefers his bill, and the defendant is to make his anſwer within eight days after his appearance; unleſs upon oath made of his age or impotency there be obtained a commiſſion to take his anſwer in the country, or he appear and make oath that he cannot anſwer without peruſal of writings or conferrences with perſons remaining in a remote place, when he hath liberty till the next term following to anſwer. This once made and returned, the plaintiff may inſtantly reply thereunto; and the defendant, being ſerved with proceſs *ad rejungendum*, muſt either rejoyne or loſe the benefit of rejoining within other eight days, and then examine witneſſes, either by commiſſion or in court; which being publiſhed, the cauſe is at hearing.

This may be performed in moſt caſes within two or three terms, and within five at the utmoſt, be the adverſe party never ſo perverſe or refractory.

How then cometh it to paſs, that this honourable court ſhould be traduced as it is, and have ſo many fowle aſperſions thrown upon it, as to be termed a dilitory court, where a ſuit will laſt longer than a ſuit of *perpetuanza* or a ſuit of *buffe*, into which the poor ſuitors, coming like a flock of ſheep to a buſh for ſhelter, are there more wett than they were in the open field; and yet the buſh will not part without a fleece, and out of which they go with the

the ſame noate they came in, pittifully complaining; and ſuch other vile reproaches?

Motions chief cauſes of delaie.

Will your lordſhip know the reaſon, and who are cauſers thereof? I anſwer in a word, Councellors; for well neere with every one of them nothing is more familiar, than ſo ſoon as the bill is exhibited, preſently to ruminate upon ſomething that may be moved; and whether it tends *promovere* or not, he is at no loſs. And if he chance to get a new order, then he thinks he hath done a great exploit, and bound the poor clyent to him for ever. The next day he is overthrown. Yet will he not ſo give it over, but he will make more work for himſelf and his adverſe pleaders; and like a wanton builder, *diruit, ædificat, mutat quadrata rotundis*, till his clyent hath ſcarce a round ſhilling left in his purſe. For what can a judge grant before proof made, unleſs it be in one of the caſes hereafter named? As St. Jerome ſaith, by an argument not drawn from the ſcripture, *eâdem facilitate contemnitur qui probatur*; for all that is built upon ſurmiſe and allegations is as ſoon overthrown as graunted.

But the pleader will ſay, he endeavours to give his clyent's cauſe a ſhort cutt, and to ſet him ſpeedily on ſhore from the tempeſt of enſuing danger and charge. Alas, how oft have we ſeen ten or twelve orders in a cauſe, and perhaps half as many reports before hearing! Coſt they nothing? And afterwards, upon the motion of a grave and judicious councellor, all is overturned or ſet aſide as impertinent, and the plaintiff ordered to proceed to his proofes, and ſoe to hearing. For accellerating of cauſes, and ſaving of expences, ſurely it had been better there to have began where they laſt ended, and happily your cauſe had been ended many years before.

Here it may be demanded, how the importunity of councellors and their needleſs motions can be prevented? I anſwer, there are but four things, that an advocate can pretend to be grounds for any motions before hearing.

Grounds of motions examined

1. Staieing of ſuits at law upon bonds
2. Settleing of poſſeſſion.
3. Stay of committing waſte.
4. Amending the defendant's anſwer.

All

All other petty motions, as touching diſcharging or puniſhing of contempts, granting of *dedimus poteſtatem*, renewing commiſſioners, &c. if they cannot be reconciled by their attorney amongſt themſelves, may be, and are moſt commonly, rectified by petition preferred to your lordſhip or to the maſter of the rolls, grounded upon ſome certificate or affidavit, or by the maſter of the rolls himſelf upon motion made by the attorney or their clerks, or by him referred to ſuch attorneys as are not *towards* the cauſe, without any great charge to the clyent or trouble of the court.

1. Staieing of ſuites at law.

True it is, that, before the cauſe can be brought to hearing, the plaintiff may be oftentymes tried at lawe; or if a verdict or judgment be had againſt him, it is a great inconvenience. Therefore the court, to prevent the ſame, uſeth to grant an injunction to ſtay the ſuite at lawe, touching any matter complained of in the bill, till the cauſe be heard, and the court take further order; and this may be done either before or after anſwer, as the cauſe ſhall require.

Injunctions before anſwer.

If it be before anſwer, it muſt be upon one of theſe grounds appearing by affidavit, as in the lord of St. Alban's 22d ordinance, viz. that the defendant being perſonally ſerved with a *ſubpœna* appeareth not, or having appeared fails, to anſwer by the time prefixed, and ſo incurrs an attachment for his contempt; or maketh oathe he cannot anſwer without ſight of writing, or conferrence with perſons remaining far off, to delay the plaintiff, or abſents himſelf that he cannot be found to be ſerved at all, and yet by his attorney craftily proſecutes ſuits at lawe. In this caſe, to meet with the defendant's contumacy and ſhifts as aforeſaid, the court hath no better way than to grant a ſtay at lawe by injunction till anſwer made or the court take further order. Yet this is ſeldom granted, without ſome taſt given of the ſtate of the cauſe; for ſome cauſes are ſo frivolous, that upon the very opening little reaſon will be found to grant any thing in favour of them, and the court may be greatly abuſed, and the cauſe carried away in a clowde of generalitys, where the particulars are not inſtanced.

Injunctions after anſwer.

And for injunctions after anſwer, they are uſed to be granted upon ſome matter confeſſed in the anſwer, or otherwiſe appearing by direct proofe or good inducement. And if it is for ſtay of a ſuit upon a bond, all the principal money, alledged in the

the anſwer to be behind unpaid, is to be brought into the court with damages after 20 marks in the hundred, from the tyme wherein by the condition of the bonds it ſhould have been paid, together with coſts, before the injunction be ſealed. And Sir Edward Phillips his courſe was, that, if the defendant would take away the money coſts and damages ſoe brought in, and reſt ſatisfied therewith, then the matter was at an end.

2. Settleing of poſſeſſion.

And touching poſſeſſion of houſe and lands, it is a tender thing, and very warily to be dealt in. And I have heard learned men ſay, that no man ought to be removed from his poſſeſſion, or ſcarce continued in his poſſeſſion, againſt a *legal courſe*, either before or after anſwer, under pretence of equity, until his equity be proved and decreed for him upon the full hearing of the cauſe.

I ſay, againſt a *legal courſe*; for if a man be forcibly driven out of poſſeſſion without order of law, *pendente lite*, then, if the juſtices of the peace adjoining do not preſently *ex officio* reſtore him, the court, upon affidavit of the manner of his expulſion, may reſtore him to ſuch poſſeſſion as he had at the time of the bill exhibited, till he be lawfully evicted.

And for continuing any in poſſeſſion there is almoſt as little reaſon; for why ſhould any ſeeke protection here againſt the lawe? If his title be good, he is ſure to ſpeede well at lawe; if naught, it were not equity but iniquity to ayde him, for titles of lands are not here determinable. To alleadge that he hath been in poſſeſſion theſe many years, is frivolous. It may be he holds a leaſe for years determined, or for lives that are dead, or by ſome verbal promiſe, which, if made upon good conſideration, it is a good plea at law. If it be not ſome of theſe things, what hurt can the lawe do him, unleſs it be in caſe of extremitye, where a lord of a manor will not admit his copyholder coming in by deſcent or by ſurrender but upon unreaſonable fines; or where a tenant for miſtaking the day of payment of his rent, or by ſome caſual means, failes to pay at the day, or hath committed ſome ſmall treſpaſs, which, in ſtrictneſs of the lawe, tends to the forfeiture of his eſtate? In this and ſuch like caſes, where the plaintiff hath an eſtate in being (though avoidable in ſtrictneſs of lawe) God forbid but this court ſhould help him in preſerving his poſſeſſion, ſeeing he is no where elſe to be holpen.

And yet in the ſaid caſes alſo the rent arrear and accrewing is to be paid to the lords or owners (if he will accept it) or elſe to be

be brought into the court, there to remain till hearing, and not the tenant to be suffered to keep possession of lands and rent, and so to hold his landlord at play with his own money.

3. Stay of Waste.

The third cause of motion before hearing may be to desire stay of waste, committed in felling of timber or fruit trees, pulling down of houses, tearing up of meadows, or the like.

This may be the most safely granted of any thing; for it is for the good of the common wealth, and no way hurtful to any man's private, unless it be to restraine a lord or owner from felling such woods or taking such benefit as he hath reserved unto himself in lease, or which otherwise do properly belong unto him, and whereby the said tenant hath nothing to do.

This suit at law and waste being staid, and possession settled, by injunction advisedly and not precipitantly and timerously granted, with such cautions as in lord St. Alban's orders are well set down, which may be done by one only motion, there can be no reason to trouble the court any more in that matter till hearing, especially if a clause be inserted, that the matter shall be heard within such a time as the court shall think fit.

Injunctions once granted, not easily to be dissolved.

I am sure the lord Ellesmere (of worthy memory) as he was very circumspect in granting these things, so once granted they were unrevocable with him till hearing. And if any were so busy as once to overthrow what he had settled (as none that was well acquainted with his grounds would) his answer was:— "The injunction is sealed, or there is an order already taken in "it, the cause shall be shortly heard; and if then the court shall "perceive you have been wronged by that which hath been "granted, you shall have full recompence." Much less was it his manner to give any time to shew cause, in these or almost in any case, well knowing, that giving days to shew cause was a loading and pestering to the court with business, and an intolerable charge to the clyent. And it were better for a judge absolutely to deny the motion, which he used to do; and then the pleaders will learn to come instructed with such matters as will make their motion unresistable, or else keep silence.

Dares to shew cause.

I dealt with a clyent not long since, that had an injunction for possession of his lands. His adversary moved by a great councellor to dissolve the same. It was granted, unless we should

ſhould ſhew good cauſe to the contrary by a day, albeit the motion was grounded only on a mean ſuggeſtion, nor verifiable by any affidavit, certificate, or other evidence in the world. At that time we had four hundred acres of land ſowed by us, with corn upon the ground wett. We attended ſix days at the leaſt to ſhew cauſe, which coſt us 10l. at the leaſt. We were heard at laſt and ſhewed cauſe, which was eaſy to do, and kept our poſſeſſion. But was not this a great miſery? Had it not been better to have ſent him away with his anſwer, ſaying, "Injunctions for poſſeſſions are not to be diſſolved till hearing upon a bare ſurmiſe"? This had been honourable and juſt to have ſaid and done, and then had we ſaved our 10l. and a great deal of trouble and diſtraction, and the other party 5l. at the leaſt which he ſpent and got nothing.

4. Amending the defendant's anſwer.

The laſt of the cauſes of motion is, for the over-ruling of pleas, demurrers, and inſufficient anſwers.

And touching demurrers and pleas, the lord viſcount St. Albans hath given good directions, as by his ordinances may appear.

But he leaveth the conſideration of anſwers to be performed by the maſters by way of referrence, which is a very chargeable courſe, and many ways pernicious to the clyent; for a courſe hath been taken of late, that if a defendant's anſwer be reported inſufficient, aſk almoſt what order or injunction you can deviſe againſt him, it was preſently granted. And this cauſeth many anſwers to be over-ruled. And to ſpeak truly, what anſwer can be made ſo plain and direct, whereat cavilling ſpirits will not take ſome exception; touching which I have heard the lord Elleſmere much complain, ſaying there was no reaſon defendants ſhould be ſo ſifted upon their oathes, the plaintiffs being at liberty. For if the defendant's anſwer be iſſuable, why may not the plaintiff thereupon make proofes, and proceed to hearing without more adoe? At which tyme, if any thing ſhall be found to reſt in the defendant's breaſt that hath not been manifeſted by proofes, the judge may then examine the defendant in open court, as I have ſeen the honourable lord often do, where, in the face of the court and preſence of ſo many grave and judicious men, more truth hath been diſcovered by a few queſtions than in three anſwers penned by a judicious lawyer.

And I do hear your lordſhip intendeth to take a moſt honourable courſe about theſe referrences:—to cauſe the plaintiff to bring in his exceptions to the anſwer in writing, together with the copies of the bill and anſwers to one of your ſecretarys, that your lordſhip reading the exceptions and the point of the bill and

anſwer

anſwer ready marked out for you (which was the courſe ſir Edward Phillips held) you may preſently judge, whether the anſwer be ſufficient or not; which, altho' it would be troubleſome at the firſt, yet if you ſend them away to ſhew proofes without feeding theſe cavilling humours, they will ſoon become leſs cumberſome.

The ſaid ſir Edward Phillips uſed alſo to judge of anſwers by motions in court; and he took the effect of the bill and anſwer upon the credit of the mover (for to read them both were a tyring of the court and hindrance of other buſineſs) whom if afterwards upon any complaint he found to have miſinformed him, he would ſet a fine upon his head, and ever after hould him to be *ſuſpectæ fidei*, and give little credit to his words, which made councellors more circumſpect in their informations.

Referring of anſwers how needful.

And generally touching anſwers, it may be truly affirmed, that there is not that cauſe of referring for fuller anſwers, which men pretend, as may be proved by this dilemma. Either the plaintiff hath proofes to verefie the ſuggeſtions of his bill, or he hath noe proofes beſide the defendant's confeſſion. If he hath, what needeth he then to inſiſt upon the anſwer? If he will alledge he hath none, then if the defendant denye the affirmation, the cauſe is preſentlye to be diſmiſſed, by an order made by the lord Elleſmere

And yet if one ſhould move to have a cauſe diſmiſt upon that point, the plaintiff would take it wonderous unkindly. And we have ſeen when a plaintiff hath alledged in his bill, that he had no remedy but the defendant's confeſſion, and that the defendant having been referred to better anſwer, hath in the end falſely denied the allegations, yet would the plaintiff afterwards fall as nimbly to his proofes, as if he had never ſo alledged; which if he had done at the firſt, what needed the anſwer to have been amended? But it was the twenty ſhillings due to every plaintiff upon an inſufficient anſwer, and the defendant's trouble that was ſought, and nothing elſe.

And now they have got a trick, for they will alledge they have no ſuch preciſe and direct proof (forſooth) as the common law requireth to prove their aſſertion, but muſt partly relye upon the defendant's anſwer; which is as much as to ſaie, they have and they have not; ſo that they will ever keep one trick or other in ſtore, to keep themſelves withall, that we ſhall not be ſoon ridd of their companys. But let this be obſerved, that after the defendant hath been tortured by multiplicity of anſwers, little will be found in any of them either of proofe or illuſtration for the good of the plaintiff; but all his proofs are taken out of the depoſitions, wherein conſiſts the life of his cauſe; the other ſerving but as popiſh confeſſion by racking of men's conſciences,

ſciences, and to entrapp them, and bring them within the compaſs of perjury or ſome other damages.

By this that hath been ſpoken, it is evident, that motions are the ſource and original of referrences, and of thoſe orders, which the laſt lord chancellor not unaptly tearmed interlocutory, being before hearing, and conſequently of all confuſion. For it hath ever been noted, that none will be ſo ready to move, as he that hath the worſt cauſe; for he hath nothing elſe to truſt to. If he cannot get his adverſary on the hipp by ſome trick or other in order or referrence, and ſoe bring him to ſome hard compoſition, *actum eſt* with him. If he had not more hope of that than his cauſe, he would never have come unto the court. Whereas he that hath a good cauſe will never dwell upon theſe bye paſſages, but thinks every ſtraw that lyeth in his way a timber logge, to hinder him from going on with ſpeede to his hearing, that he may ſo obtain a decree and a good end of his buſineſs. Motions how prevented.

I have heard wiſe men ſay, that in every action a man undertakes, he ſhould propound unto himſelf, what the end ſhould be; and the end of every man's ſuit is not obtained but by a judicial hearing. And yet we ſee how hard a thing it is to keep men within the way that leadeth to this hearing. They will be ſtraggling; which argueth plainly they ſeek no redreſs of wrongs, but rather to do wrong.

But if the courſe before mentioned be conſtantly obſerved, no order will be granted, but with a *quomodo conſtat*, upon ſound grounds and plain demonſtration of the truth of the information, and that proved, or *cui bono*, how is it material, reaſonable, or expedient; how doth it conduce to expedite the cauſe; what neceſſity is there of this motion; what equity; why ſhould it be granted? If this appear, then *bene habet*, the motion may be anſwered with a *fiat*, or elſe the beſt anſwer muſt be a *nolumus*. Whereupon it will enſue, that little will be moved, leſs will be granted, and what is granted will never be overturned. And conſequently the vaſt carriage of motions, referrences, and orders, which grew to that height by the facilitye and flexible nature of judges that uſed to grant whatſoever was deſired, will eaſily be ſpared; and thereby alſo it will followe, that badd cauſes will have no great ſtomake to come thither, and the good will be much encouraged.

And

And thus with much ado, *per tot discrimina rerum*, after many rubs and wrenches, we have brought our cause to hearing, where we hope to have a good end of our business. But there be great delaies also ever after hearing. Wherefore, before I begin to speak, I cannot chuse but in a word or two to express the rejoicing that we all have at the most worthy course which we heard your lordship hath begun to take concerning daies of hearing, by referring them to the by whom they were mannaged from the first beginning, with this charge, to prefer the auntyenteſt and most important first, and that without any fee to be demanded or taken therefore.

Daies of hearing.

This is one good step to justice, that a man may come to the judgment-seat so freely; and, contrarywise, it was no good sign, that justice would there be rightly administered, where annuities and pensions were raised out of daies of hearing.

And as touching the causes themselves, great difference will be found between those that have been perplexed with a variety of orders and referrences, and those that have come on smoothly without interruption to hearings. The one will be so mangled, tattered, and abused, that they will be hardly cured; the other without great difficulty will be ended.

Difference of causes.

And for the manner of hearing, all men know the same to be plain and easy. Yet divers are the stratagems and devices that some pleaders will use, as much as in them lyeth, *imponere judici*, and to cast a mist before his eyes; namely, a wilful and industrious declaiming, and shunning the state of the question, by confident assertion of things no-where to be found, and impudent deniall and not admitting of those that are plainly confessed and proved in the books, needless digressions, vaine excursions, frivolous amplifications of what they have delivered, and such like; which, being with great severitye at the first represſed, will soon be prevented ever after.

Manner of hearing.

For when the charge of the bill is opened by the plaintiff's councel, and the answer by the defendant's, though the pleadings be long, yet the question is but short; the true state whereof the councel on both sides are to be urged forthwith to agree upon; which once apprehended and repeated by the judge, the first question that the judge should propound is, to know what the law holdeth concerning the point, and upon what straine it was brought into this court: and if the lawe be against the plaintiff, (as it must needs be, or else what makes hee here?) I fear it will fall out, that in many cases little help will be given him in this court; for lawe and conscience are so linked together,

Opening of the law to be first known.

ther, that they are hardly to be ſevered, and conſcience muſt always be grounded upon ſome lawe.

And if the queſtion be for land of inheritance or goods, (I take it under reformation) unleſs fraud or truſt be manifeſtly proved, it can never be holpen in the chancery. In all the caſes of conſequence which are propounded and argued in the Dialogue between the Doctor and the Student, howſoever at the firſt the author ſeemed to reaſon ſtrongly for equity, (for againſt the grounds and maxims of the lawe there is no diſputing) there are but few caſes in all his book, where he alloweth any to ſue out a *ſubpœna*, but thinketh it better to ſuffer an inconvenience than a miſchief.

Soe that by examining of judgment of the lawe in every caſe, it will ſoon appear whether it be a matter relieveable in our court or not.—If not, then the judge may diſcharge himſelf of it quickly by a diſmiſſion; for it is not a tollerable thing, that one court ſhould encroach upon the juriſdiction of another, whereof his majeſty in one of his ſpeeches (extant in print) greatly complaineth, and miſliketh that any court ſhould ſeek to draw mulcture to itſelf as it doth. And I have read in hiſtories concerning the ſtate of Venice, that with them it is counted ſo odious a crime, that they eſteem it almoſt as bad as ſacrilidge for one court to intermeddle with another's buſineſs. And I marvel, that any man ſhould think the judges of other courts ſhould ever be inclinable to cheriſh or give way unto multiplicity of ſuits; for I cannot conceive what benefit they reap thereby, beſides torment and vexation. And therefore, as I ſayod, if it be not proper for the court, a fair riddance will be beſt.

If it be peculiar for the court, then the next thing is, that the plaintiff's councel proceed orderly to ſhew prooſes. And therein they are to be enjoined to propound the method which they mean to obſerve in hearinge of their prooſes, aſſuming unto themſelves the probate of ſuch things as being proved may make good the aſſertion of the bill, and to divide the ſame into ſeveral points and fractions; and every point to be handled by itſelf, and depoſitions to be read thereupon; and no tranſition and leaping from one point to another, before the firſt be cleered, and the judge have declared, or at leaſt wiſe treaſured up in his own memory (till the concluſion) the opinion he hath conceived, whether the point be ſubſtantially proved or not. And this is but in ſome intricate cauſes. In moſt there is no ſuch adoe. Which done, and the like courſe taken by the defendant's councel, the knot will readily be diſcovered; and then it were better (like Alexander the Great) to cut it aſunder with the ſword of juſtice, than by tedious

Benefit of expedition.

tedious delaies seeke to extricate the same; for sometymes a quick dispatch even with death itself is counted a great favour, and the intollerable charge of delay is to be considered. *Iniquissima pax est anteponenda justissimo bello.* I could instance some causes, that were heard and well understood ten years since and more, by a judge that knew (no man better) how to end them, but did forbear soe to do, for some private respects best known to himself, or else hopeing that the parties hearing the opinion of the court, and the one side seeing his nakedness discovered, which before by the soothing of his councel he could not discerne, would either of them themselves, or by mediation of friends, fall to composition. But sure I am the causes yet remaine, as they were, undecided; and God knoweth when they will be determined. And what hath been expended in the meanwhile by bothe partyes were a shame to be spoken, with one fourth part whereof the most obstinate party would at that tyme have gone away well satisfied.

And what hope is there that such as are *partium studiosi* (as most men in their own cases are) will ever of themselves inclyne to some reasonable ends? We see when they are in open court, that the majestye and presence thereof doth sometymes reclayme them; and then they will seem tractible, and ready to hearken to any good motion. But no sooner are their backs turned, but they grow wilder than ever. Therefore there is little hope in this course.

What else may be the cause, that causes upon hearing are not presently ended? Shall I conceive it to be pusillanimitye in the judge, that he feareth or is loath to displease any partye? I dare not think it; for have I not sayd ye are Gods; and shall ye then stand in fear of men? Verily a clear conscience and clean hands will be such a bulwark, that the greatest oppositions will not be able to shake it.

Hic murus aheneus esto,
Nil conscire sibi, nullâ pallescere culpâ.

Precedents. Some judges, when they seem doubtful what to determine in a cause, will be inquisitive after precedents; which I cannot conceive to what purpose it should be, unless that being desirous to pleasure a friend, and the matter being of that nature that they are ashamed to do it, they would faine know, whether any before them have done so ill as they intend to do. For do they think, that if any other have done the like, it is a sufficient warrant for them therefore? Surely noe! But every judge, taking upon him that weighty calling, ought to direct his orders *secundum allegata et probata*, and according to the rules of a good conscience, guided by the word of God, and upon

and upon certaine knowledge of the lawes of the realm agreeable thereunto; and ſoe to divide between lawe and equity, that for the particular of any private perſon no violence be offered to the lawe; and not to be led like a bear by the noſe after other men's examples, which, if it were admitted, there is no injuſtice, how groſs and palpable ſoever, but might by this means eaſily be excuſed.

Some advocate will alſo be inſtant, that a cauſe may be referred either to the maſter of the court, or ſome gentleman in the country; which, if it ariſe from the voluntary motions of both partyes, and upon their free election of the committees, is the more tollerable; otherwiſe it may be dangerous, and it is a kind of chamber-work condemned by his majeſty's late proclamation. And we have ſeen at ſuch tymes letters and meſſages come from great perſonages; and we have heard other matters have been brought, which, how ponderous they may be with mean judges and others not ſworne to do juſtice, is not eaſy to conjecture. But the anſwer, which the often-named and never ſufficiently praiſed ſir Edward Phillips was wont to give to their motions is *inſtar omnium*, and moſt worthy to be regarded:—"I ſitt not "here," ſaith he, "to referr cauſes; they might have done "that before they came hither: now they are here, they ſhall "know their doome." And in very deed he would be at ſuch tymes ſo uſed to the matter, that he would either by mediation or make an end between them with their own conſents (if it were poſſible) or elſe returne to his judicial office, and ſtrike the matter ſo dead by delivering his reſolute opinion, that it never after revived. Reference after hearing.

More might be ſayd concerning the inconveniences which accompany referring of cauſes to maſters, as alſo to private partyes; of which, as ſomethynge hath been written heretofore upon another occaſion, I forbear now to ſpeak, as alſo any more at this tyme concerning theſe matters, fearing I have been too tedious already; for which humbly craving pardon, I ſo conclude this my diſcourſe.—The ſome whereof is briefly no more but this, to denote the miſchiefs that come by ſtraining the court too high, by being too favourable to contentions ſpirritts, by granting too eaſily frivolous motions, and by forbearing too long to give a reſolute anſwer. Conclusion.

Some other things there are amiſs in the court; as exceſſive fees, and multiplicitye of clerkes, wherewith (for that there are preſentments and orders concerning the ſame) I ſhall not need at this time to trouble your lordſhip. It reſteth, that

by

by adding life (which is execution) thereunto, there may follow a ſpeedy and godly reformation; which that your lordſhip, to the glory of God, and the good of the commonwealth, may have the honour to effect, none more heartily deſireth than

Your lordſhip's humble ſervant,
ever to be commanded,
GEORGE NORBURIE.

CONCERNING THE

EFFECT

OF

SENTENCES of the COURTS ECCLESIASTICAL

In CASES of MARRIAGE,

WHEN PLEADED OR OFFERED IN EVIDENCE

In the COURTS TEMPORAL.

[This tract was written by the editor in April, 1776, previously to a famous trial before the higheſt judicature of the kingdom, the proceedings on which are publiſhed in the eleventh volume of the State Trials; the editor having been the junior counſel conſulted by the proſecutors on that unhappy buſineſs. It was originally intended for private uſe; for the purpoſe of it was merely to ſhorten the labours of the ſenior counſel, who afterwards at the trial ſo eminently diſtinguiſhed themſelves as advocates againſt the accuſed. But the points to which the argument applies being of a general nature, the editor flatters himſelf, that the information it contains may not be deemed wholly unacceptable to profeſſional readers. He truſts too, that the manner of treating the ſubject and the time of publication are ſuch, as to inſure him againſt all danger of giving offence or pain to any perſon whatever; from his anxiety to avoid which he here omits naming any of the parties concerned. Indeed if the editor was not moſt thoroughly convinced of there being no poſſible ground of reaſonable objection to now publiſhing the argument, except its own want of merit, he ſhould hold himſelf deſerving of cenſure for thus printing it.—To this explanation the editor deſires leave to add, that the argument is given with ſcarce any deviation from its original form, the ſlight additions now made to it being thrown into notes. He is not inſenſible, how greatly the argument might have been enlarged and improved from the very ſuperior conſideration of the ſubject to be met with in the arguments delivered at the trial itſelf. On the contrary, he feels its defects and inferiority ſo ſtrongly, that on that account he doubts, whether the compariſon may not take from him all apology for riſquing ſuch a publication. But he doth not mean now to preſent a new treatiſe on the ſubject, which could not have been executed without further delaying this volume, already too long poſtponed. He merely intends to offer one compoſed ſeveral years ago.]

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In the COURTS TEMPORAL.

A. *claiming to be a ſingle woman libels* B. *in the conſiſtorial court of the biſhop of London for jactitation of marriage.* B. *defends himſelf by alledging a marriage, and to this allegation* A. *puts in an anſwer.—Afterwards witneſſes are examined and the cauſe is heard before the biſhop's official, who pronounces ſentence by which he declares* A. a ſpinſter, and free from all matrimonial contracts or eſpouſals as far as to us as yet appears, and more eſpecially with B. *and concludes with an award of coſts againſt* B. *in words deſcribing the ſentence to be a* definitive ſentence or final decree. *—Relying on the ſentence* A. *marries* C. *after whoſe death* A. *is intitled on the ſtatute of the* 1 *Jam.* 1. *cap.* 11. *for felony in marrying* C. her former huſband B. being then alive.

In this caſe, before the indictment came on for trial, it was thought fit to have a full diſcuſſion in the form of an opinion of two queſtions of law; namely,

"*Whether the ſentence pronounced in the eccleſiaſtical court, if*
"*introduced by the counſel for* A. *either as a plea or in evi-*
"*dence upon the trial of the indictment, would be held as*
"*concluſive in bar to the proceeding on the trial?*"—And,

"*Whether the proſecutor would not be at liberty to enter into evi-*
"*dence of fraud and colluſion in obtaining the ſentence?*"

To theſe queſtions the anſwer given by the Editor was as follows:

UPON a very full conſideration of this caſe, I am of opinion, that the ſentence of the eccleſiaſtical court, though only in a ſuit of jactitation, will, whilſt it remains unrepealed, operate concluſively in all of our *temporal* courts, as well when

the ſuit there is *criminal* as when it is *civil*, unleſs *colluſion* between the parties in obtaining the ſentence is averred. But I think, that colluſion may be averred and given in evidence to avoid the ſentence; and that being proved, it will make the ſentence a nullity, and take from the party endeavouring to ſhelter herſelf under it every kind of benefit and protection.

I.

THE principle, on which I hold the ſentence, if fairly obtained, to be concluſive, is this.—I take it to be a general rule of our law, that where any matter belongs to the juriſdiction of one court ſo peculiarly, that other courts can only take conuſance of the ſame ſubject indirectly and incidentally, the latter are bound by the ſentence of the former, and muſt give credit to it. This rule, which prevails in various inſtances, is more eſpecially applicable to ſentences of the ſpiritual courts in caſes of marriage. Amongſt us the law of marriage hath been deemed a ſubject merely of ſpiritual conuſance from very ancient times; nor have the temporal courts for many centuries paſt pretended to examine the legality of marriage, except when the queſtion hath occurredin the trial and as a part of ſome other more general iſſue falling within the ſphere of temporal juriſdiction. Of the *fact* of marriage the temporal courts ought to undertake the trial, and always do, when the *fact only* is in queſtion, as is uſually the caſe in perſonal actions. See 1 Lev. 41. 2 Ro. Abr. 584. Vin. Abr. v. 21. p. 43. But if the *lawfulneſs* is really in iſſue, the temporal court cannot proceed, without calling to their aid the eccleſiaſtical judge. Therefore when in dower or in appeal the lawfulneſs of a marriage becomes the iſſue, it muſt be remitted to the ordinary for trial by certificate. The law was formerly the ſame when bigamy (not the offence ſometimes called ſo, but marrying a ſecond wife after the death of the firſt, or marrying a widow, either of which before the ſtatute of 1 Edward the 6th, c. 12. diſqualified from having the benefit of clergy) was denied on its being counterpleaded to clergy; and the biſhop's certificate ſtill is the proper and only mode of trial in every ſuit, in which "whether there is a lawful marriage or not" is made the point in iſſue. See 2 Ro. Abr. 585. and 586. On the other hand, if the parties to the ſuit in the temporal court go to iſſue on any other matter than the lawfulneſs of the marriage, as where the general iſſue is pleaded in ejectment or treſpaſs for trying the title of land, and on the trial of ſuch iſſue a marriage becomes eſſential to the title of either party, the lawfulneſs of the marriage is as much the ſubject of the trial, as

any

any incidental fact of a kind merely temporal material to the iſſue. But though the temporal court may thus incidentally try the lawfulneſs of marriage, when it is complicated with and comprehended within ſome other iſſue; yet, if any ſentence of an eccleſiaſtical court is offered in proof or diſproof of the marriage, the peculiar juriſdiction of the latter is ſo attended to by the former, that it will not ſuffer any point aſſerted by the ſentence to be controverted; a deference, which in my opinion is very proper to be ſhewn by thoſe, who have not the juriſdiction directly or *ex profeſſo*, but only by accident and collaterally, to ſuch as have. The authorities to this purpoſe are numerous; nor do I know of one to the contrary.

In the caſe of Bunting and Lepingwel Mich. 27 and 28 Eliz. which was an action of treſpaſs for trying the title to a copyhold eſtate, the jury by a ſpecial verdict found a ſentence of a court of audience decreeing a marriage on a precontract *per verba de præſenti*, and annulling a former marriage on the ſame account, and alſo found a marriage ſolemnized in conformity to this ſentence; and the plaintiff claiming as heir under this ſecond marriage, and the defendant under the iſſue of the firſt, the title turned on the effect of the ſentence. The court of king's-bench held, that though the huſband by the firſt marriage was not a party to the ſuit in the ſpiritual court, yet he was bound by it. The words of lord Coke in his report of the caſe are, *that as the conuſance of the law of marriages belongs to the eccleſiaſtical court, and the ſame court had given ſentence in the caſe, the judges of our law ought, however contrary it may be to the reaſon of our law, to give faith and credit to their proceedings, and to think their proceedings are conſonant to the law of holy church*; *for* cuilibet in ſuâ arte perito eſt credendum; *and ſo always have the judges of our law done.* See 4 Co. 29. a. and S. C. in Mo. 169.—The language of this caſe tends to ſhew the great authority of ſentences of the ſpiritual courts on marriage as a ſubject peculiarly within their juriſdiction; but the right of giving evidence for the purpoſe of re-examining the lawfulneſs of the marriage not appearing to have been the point immediately before the court, the caſe, it muſt be owned, is not wholly a precedent of the concluſive quality of an eccleſiaſtical ſentence to the preſent purpoſe *.

In

* From the undeniableneſs of the poſition, that the direct juriſdiction over queſtions concerning the legality of marriage peculiarly belongs to the eccleſiaſtical courts, and that its ſentences on this head are in general concluſive to the courts temporal, I was content to begin with the authorities in lord Coke's time—But the acknowledgment of this peculiar juriſdiction both as to marriage and ſubjects of affinity to it, ſuch as baſtardy, and of the effect of the ſentences of the eccleſiaſtical courts in ſuch matters, may be traced as a ſettled point in the oldeſt books of

In Kenne's case 4 Jam. in the courts of wards, the principal point was on the effect of a sentence against marriage. One Kenne died seized of a manor held of the crown by knights service *in capite*; and an office having found Elizabeth an infant ten months old to be his daughter and heir by Florence afterwards Lady Stallenge, the wardship and custody were granted by the court of wards to Sir Nicholas and her; and against them Martha Williams with her husband exhibited a bill in the court of wards, surmising, that Martha was Kenne's daughter and heir by one Elizabeth Stowell, and therefore praying leave to traverse the office. When this cause came to a hearing, on the side of the plaintiffs there was evidence proving the marriage of Kenne with Elizabeth Stowell many years before his marriage with Florence lady Stallenge, and that Kenne and Elizabeth Stowell were both of the age of consent at the time of their marriage; and on the side of the defendants there was a sentence of the court of audience in a suit between Kenne and Elizabeth Stowell,

of our law. Thus Glanville, where he treats of an heir suing for land in the temporal court in that character, tells us, that if it is objected to the heir that he is not born of a lawful marriage, the archbishop or bishop of the place shall be written to, in order that he may take cognizance of the marriage, and certify his proceedings to the King's temporal court; after which Glanville gives the form of the writ for this purpose, and in it the King explains the reason for resorting to the ordinary to be *quoniam ad curiam meam non spectat agnoscere de bastardia*. Glan. lib. 7. c. 13. 14. Bracton also in his copious treatise on the action of dower agrees, that if the want of a lawful marriage is excepted to the claim of dower, the secular court cannot proceed, but must write to the bishop. Bract. fo. 502. a. But what is most curious in Bracton is the examples he gives of *pleading sentences of the ecclesiastical court in the action of dower on the point of marriage*, and also of replying to such pleas that the sentence was reversed on appeal. Bract. 306. a. 307. b. The same subject is treated in Fleta and Britton, both shewing how matrimonial sentences may be pleaded in the action of dower. Flet. lib. 5. c. 28. and Britt. fo. 251. b. The latter of these writers is the most full on this subject, having two chapters particularly applying to it; one concerning the *exception of concubinage*, the other on *the exception of plurality of wives*. See Britt. cap. 107. and 108. I take this notice of pleading sentences of the spiritual court on the point of marriage to shew, that anciently, at least, the bishop's certificate was not always referred to for trial of marriage in dower, but that, if there was a previous subsisting sentence of the ecclesiastical judge, the party for whom it operated might use it to avoid a further trial of the same question. However, it is proper to apprize the reader, that there is a modern case, in which the court of common pleas held the trial of marriage in dower by the bishop's certificate to be unavoidable. Therefore in the case before them, the tenant in dower having pleaded, "never accoupled in lawful matrimony," and the demandant having in reply stated a sentence of the court of archers in favour of her marriage, the court adjudged, that the replication was bad, and that to such a plea the demandant was under the necessity of joining issue in order to have the marriage sent for trial to the bishop. 2 Wilf. 118. & 127. This decision too was the stronger, because the sentence pleaded in the replication was in a cause, which had been removed by appeal from the bishop's court to the superior court of the Archbishop of Canterbury; and consequently sending the case for trial by certificate was giving to the inferior jurisdiction an opportunity of contradicting the sentence of the superior one, even in a case actually decided by the latter on an appeal from the former.

Stowell, declaring their marriage void on account of the impuberty of the parties, and therefore divorcing them, and granting them liberty, *ad alia vota convolanda*. This caſe, which conſiſted of other particulars not material to the effect of ſentences of the ſpiritual court, was referred by the court of wards to ſeven of the judges, amongſt whom lord Coke was one; and it appears to have been argued before them ſeveral times. The firſt and principal point is ſtated by lord Coke to have been, whether the plaintiffs ſhould be received to aver againſt the ſentence of divorce that Kenne and Elizabeth Stowell did conſent to the marriage, or ſhould be concluded by the divorce: and though it was urged, that the age of conſent to marriage was a thing taken notice of both by the common and ſtatute law, and therefore triable by the commonlaw, and that ſentence *contra matrimonium nunquam tranſit in rem judicatam*, all the judges were of opinion, that the ſentence ſo long as it remained in force was concluſive.—This determination is a very ſtrong precedent againſt entering into any proof on a queſtion of marriage already determined by the eccleſiaſtical judge; for there was evidence that the parties were not of the age of conſent; and it ſeems to have been agreed by the judges, that the ſentence being *contra matrimonium* was not concluſive on the iſſue of Kenne by Elizabeth Stowell in the ſpiritual court; and yet the judges held the ſentence to be concluſive in the temporal court. See 7 Co. 41. b. and Cro. Jam. 186.

It being thus ſettled by Kenne's caſe, that the temporal muſt give credit to and were concluded by ſentences of the eccleſiaſtical court in caſe of marriage, it followed of courſe not to receive any evidence in contradiction to ſuch ſentences; for to what purpoſe ſhould proofs be entered into, if, when given, they cannot be made uſe of? Accordingly in Jones and Bow in B. R. 4 W. and M. on a trial at bar in ejectment, the queſtion being, whether Sir Robert Car was married to Iſabella Jones, under whoſe iſſue the plaintiff claimed, and the defendant offering, by way of anticipation of the plaintiff's evidence of the marriage and to prevent his giving any evidence, a ſentence of the arches in a ſuit of jactitation decreeing that there was no marriage, the whole court upon debate held, that this ſentence whilſt unrepealed was concluſive againſt all matters precedent, and that the temporal courts muſt give credit to it, the ſubject being of mere ſpiritual conuſance. See Carth. 225. There are ſeveral other reported caſes, in which ſentences of the eccleſiaſtical court on queſtions of marriage have been received as concluſive evidence. In Hatfield and Hatfield, which was a cauſe in equity, the court of exchequer in Ireland, and afterwards the houſe of lords in England on an appeal, held a ſentence againſt a

marriage

marriage in a cauſe of jactitation to be concluſive, though the trial in the ſpiritual court was not commenced till after filing the bill in the exchequer. See appeals in Dom. Proc. for the year 1725. In Clews and Bathurſt, which was a niſi prius caſe, lord Hardwicke, whilſt chief juſtice of the king's bench, after hearing a civilian, received a ſentence in a cauſe of jactitation as concluſive evidence againſt the plaintiff on an action for ſeducing his wife; though the ſentence was not pronounced till after joining iſſue in the action at common law. See 2 Stra. 960. and S. C. in Caſ. B. R. temp. Hardw. by lord Annally 11. In Da Coſta and Villa Real, which was alſo before lord Hardwicke at niſi prius, he held a ſentence againſt a contract of marriage to be concluſive in an action for damages founded on breach of the ſame contract; and lord Annally, in his report of the caſe, ſays, that this deciſion was after long and learned arguments both by civilians and common lawyers. See 2 Stra. 691. and S. C. in Caſ. B. R. temp. Hardw. by lord Annally 18. Laſtly, in Prudam and Phillips, which was before lord chief juſtice Willes at niſi prius, a ſentence, annulling a marriage between Mr. Muilman and Mrs. Conſtantia Phillips, on a former marriage with one Delafield, was received as concluſive in an action of aſſumpſit againſt Mrs. Phillips after Delafield's death. See 2 Stra. 691. *in margine*, and Mr. Ford's MS. note *.

* The note of this late eminent barriſter, as taken from a valuable collection, which it is hoped his worthy ſon the preſent Mr. Ford may for the ſake of the profeſſion be hereafter induced to publiſh, is in the words following:

"Aſſumpſit brought againſt defendant, who gave in evidence a marriage with "one Mr. Muilman. Plaintiff ſhewed a ſentence in the ſpiritual court annulling "that marriage, for that at the time of ſolemnizing it defendant was married to "one Delafield alias Daval, which the plaintiff's counſel relied upon as concluſive "evidence of the nullity of ſuch pretended marriage. And ſo it was agreed, unleſs "defendant could be admitted to ſhew great fraud in obtaining the ſentence, and "ſo avoid it, as judgments are daily avoided by replications of fraud.—Reſolved "on great debate, that the eccleſiaſtical law was part of the law of the land, and "ſentences by their judges were therefore in matters of ſpiritual juriſdiction of "equal and the ſame force with judgments in courts of record, or in courts of "equity. Whatever objections, therefore, would avoid a judgment in a court of "common law, would be ſufficient to overturn a ſentence in the ſpiritual court, "but none others: that fraud was a matter of fact, and if uſed in obtaining judg-"ments was a deceit on the court and hurtful to ſtrangers, who, as they could "not come in to reverſe or ſet aſide the judgment, muſt of neceſſity be admitted "to aver it was fraudulent; and this was the reaſon why executors might have "ſuch averments. But who ever knew a *defendant* plead, that a judgment obtained "againſt him was fraudulent? He muſt apply to the court; and if both parties "colluded in the cheat upon the court, it was never known that either of them "could vacate the judgment. Here defendant was party to the ſentence, and "whether ſhe was impoſed upon or ſhe joined in deceiving the court, this is not "the time or place for her to redreſs herſelf. She may if ſhe has occaſion appeal, "or apply otherwiſe, to the proper judge. Note, Delafield died about ſix months "before action brought.—Prudam & al. v. Con. Phillips alias Muilman alias "Delafield coram Willes chief juſtice, Sittings in Middleſex for C. B. after Mi-"chaelmas Term 1737."

Such

Such are the reported cases, in which sentences of the spiritual court on the point of marriage have been deemed conclusive before the temporal judges; and it is of importance to observe, that this conclusive quality is attributed, without regarding whether the sentence was in its nature reversible and avoidable or final, or distinguishing parties and privies from strangers. In Kenne's case the sentence being *contra matrimonium*, the rule of the civil and common law that such a sentence *non transit rem judicatam*, that is, doth not become a thing *finally adjudged*, was insisted upon, and even the judges seem to have conceded that the sentence was reversible by the issue against whom it was given in evidence; but still they held it conclusive to the temporal courts. The sentences in most of the subsequent cases were in suits of jactitation, which clearly are not final, as appears not only from the form of such sentences, but from the general doctrine in respect to sentences *contra matrimonium*; and in some of these cases, particularly in Clews and Bathurst, and in Da Costa and Villa Real, the two cases before lord Hardwicke, this objection was strongly urged, but it was over-ruled. In Bunting and Lepingwell the court held the sentence to be binding on a stranger; and in Hatfield and Hatfield it was accordingly received as conclusive evidence against one who was neither party nor privy; and as in this latter case the sentence concluded a stranger, so in Clews and Bathurst, and in Prudam and Phillips, strangers were allowed to use a sentence against those who were parties.—From this general practice of deeming such sentences conclusive universally and without exception, it seems obvious, that the ground, on which our temporal judges give this credit, is the peculiar jurisdiction of the ecclesiastical courts in cases of matrimony, independently of other consideration; and not the effect of such sentences, either on account of the nature of the suit in which they are given, or in respect of any distinction of persons against or for whom they may be offered in the temporal court.

This idea of the reason, why the sentences of the spiritual court in the instance of marriage are so operative with the temporal judges, receives great confirmation from the effect of sentences in other cases of peculiar jurisdiction.

1. The *granting of administration* and the *probate of wills* belong only to ecclesiastical jurisdiction; and there are various authorities to prove, that sentences pronounced in the exercise of this sole and exclusive jurisdiction are so binding on the temporal courts, as to be conclusive evidence of all points directly determined.

Thus

Thus if a ſuit is inſtituted to try who have the right to adminiſtration, and one of the parties claims as huſband, and the eccleſiaſtical judge decides that there is no marriage, and therefore grants the adminiſtration to the other claimant, it ſhall not afterwards be allowed to make title in an action at common law to the inteſtate's goods under the ſame marriage.—Blackham's caſe 1 Salk. 290. is ſtrong to the point of adminiſtration; for though in that caſe the adminiſtration did not conclude, it was on a diſtinction, which confirms the general doctrine. It was an action of trover before lord chief juſtice Holt at nifi prius, in which the plaintiff proved that the goods had belonged to one Jane Blackham, came into his poſſeſſion by having married her a few days before her death, and had been taken away from him by the defendant; and the latter made out his title by proving himſelf Jane Blackham's adminiſtrator; and his counſel inſiſted, that the adminiſtration was concluſive evidence againſt the marriage; it being argued, that the adminiſtration could not have been granted to the defendant, if the plaintiff had been huſband. The words of lord chief juſtice Holt, as given in Salkeld, are theſe: *A matter, which hath been directly determined by the ſentence of the ſpiritual court, cannot be gain-ſaid. Their ſentence is concluſive in ſuch caſes, and no evidence ſhall be admitted to prove the contrary: but that is to be intended only in the point directly tried. Otherwiſe it is, if a collateral matter be collected or inferred from their ſentence. As in this caſe, becauſe the adminiſtration is granted to the defendant, that the plaintiff was not the inteſtate's huſband, as he could not have been taken to be, if the point there tried had been "married or unmarried" and their ſentence had been, "not married."* 1 Salk. 290. Here lord chief juſtice Holt plainly concedes it as undoubted law, that, if on granting the adminiſtration the queſtion of marriage had been tried and decided, the ſentence would have been concluſive in the temporal court, notwithſtanding the different purpoſe of the ſuit there; and the principle, on which he founds the concluſive quality of ſuch ſentences, appears to have been the peculiar juriſdiction of the ſpiritual court in matters of adminiſtration; for that was the ground of argument taken by the defendant's counſel, and the chief juſtice ſpeaks generally without confining the concluſion to parties and privies. The doctrine of lord Holt in Blackham's caſe was cited in the caſe of Bouchier and Taylor, which was lately * determined in the houſe of lords; and lord Mansfield read lord Holt's words out of Salkeld as the ground of his opinion on one of the points in this latter caſe.

* 7 March, 1776.

As

As to the concluſion arising from probates of wills when given in evidence, it was formerly queſtioned; the origin of the doubt probably being the rule, that probates and adminiſtrations, when pleaded, may be denied. Plowden in Graybrooke and Fox ſtates the authorities to this purpoſe very fully; and at the end of Henſlowe's caſe lord Coke, after going through the points determined, enters into a diſcuſſion of the ſame ſubject: and both agree, that though the granting of probates and adminiſtrations belongs to the eccleſiaſtical court, yet the trial of them is left to the common law; and if they are traverſed or denied it muſt be by a jury, and not by certificate of the ordinary, as in caſes of excommunication. See Plowden 282, & 9 Co. 30. b. Lord Coke accounts for this, by obſerving, that excommunication was originally of eccleſiaſtical conuſance, but that probate and adminiſtration were not ſo till late times, and that then only the granting of them and not the trial was given. In another place he gives a different reaſon; for, in the caſe of the abbot of Strata Marcella he ſays, that trial of probate and adminiſtration is by the country, and not by the rolls of the biſhop, becauſe his court is not a court of record, 9 Co. 31. a. Indeed neither of theſe reaſons conveys much ſatisfaction to the mind; but whatever the reaſon may be, or whether any good reaſon can be given or not, the law ſeems clearly to be as lord Coke repreſents it.

It being thus the eſtabliſhed practice not to allow a probate to be concluſive in pleading, hence, as I conceive, grew the doubt, whether a probate was concluſive in evidence.—This became a point in Noel and Wells, which was before the king's bench in Eaſter 20 Cha. 2d. See 2 Sid. 359. 1 Lev. 235. 2 Keb. 337. 343. In that caſe an action was brought by one as executor, and the defendant pleaded that plaintiff was not executor. On the trial the plaintiff gave the probate of the will in evidence, and the defendant offered to prove that the will was forged; but the chief juſtice, before whom the cauſe was tried, refuſing to receive this evidence, there was a verdict for the plaintiff, ſubject to the court's opinion on a caſe. From Keble, who, though one of our worſt reporters, in this inſtance gives more of the argument than the other reporters of the ſame caſe, it appears, that the ground of the argument for the evidence was, that the probate was not concluſive in pleading, an executorſhip or teſtament being deniable in pleading notwithſtanding *profert* of the probate, which is always neceſſary in action by executor; and therefore it was inſiſted, that the probate ought not to be concluſive in evidence. But this reaſoning did not prevail; for the whole court held, that nothing ſhould be given in evidence to contradict that which was really adjudged or allowed by the ſpiri-

tual

tual court in a matter thus wholly and peculiarly within its conuſance; though any thing to ſhew that there was no probate, as the forgery or revocation of it, or to ſhew that the probate was granted by one not having juriſdiction, was proper evidence. See 1 Sid. 359. As to the objection of its being allowable to deny the executorſhip or teſtament notwithſtanding *profert* of the probate, it was anſwered by obſerving, that it proved only a right to deny the ſeal of the ordinary, and that the iſſue was triable by a jury, and nothing as to the ſort of evidence proper to ſuch an iſſue. See 2 Keb. 337.—But this determination in Noel and Wells did not quite ſettle the doctrine; for the ſame point was afterwards made in Phillips and Chicheſter, Eaſter 33 Cha. 2d. That caſe was error in the king's bench in England, on judgment in an ejectment given by the common pleas in Ireland, and affirmed by the king's bench there. The ſubject of the cauſe was a leaſe for years of which one Edward Chicheſter died poſſeſſed. The leſſor of the plaintiff made title to the leaſe under an adminiſtration granted by the primate of Ireland in 1677; the defendant under an adminiſtration with the will annexed by the archbiſhop of Canterbury on account of the executor's being beyond ſea, and alſo under a probate granted to the executor himſelf by the biſhop of Fernes in 1678. The queſtion aroſe on a bill of exceptions, for not directing the jury to conſider the probate as concluſive evidence of the will, in conſequence of which the jury found for the plaintiff, though there was no other evidence againſt the will than the adminiſtration by the primate of Ireland. In Ireland the king's bench gave judgment for the plaintiff, notwithſtanding the bill of exceptions, and it was affirmed in England. See T. Jo. 146. and Raym. 404. On the firſt conſideration, this caſe ſeems to contradict that of Noel and Wells; but from Sir Thomas Raymond's report it appears, that the king's bench in England allowed the probate to be concluſive evidence, and in their affirmance of judgment proceeded wholly on an idea, that demurrer to the evidence againſt the probate, and not a bill of exceptions to the judge's direction to the jury as to its operation, was the proper way of objecting. Sir Thomas's words are theſe: *The judgment was affirmed by the whole court, becauſe though the evidence be concluſive, yet the jury may hazard an attaint if they pleaſe; and the proper way for the defendant had been to have demurred upon the plaintiff's evidence. This queſtion, whether the probate is concluſive, hath been variouſly allowed; but of later days it hath been adjudged, that nothing can be given againſt it, but forgery of it or its being obtained by ſurpriſe.* See T. Raym. 405.-But whatever inference this caſe may bear, all the ſubſequent authorities, I can meet with on the ſubject, conform

conform to the reſolution in Noel and Wells.—There is a caſe of Mich. 9 W. 3. in lord Raymond and 12 Mod. in which lord Holt and the whole court of king's bench expreſsly avow, that probate is concluſive evidence of a will of perſonal eſtate. It was the caſe of a mandamus to ſir Richard Raines judge of the prerogative court, commanding adminiſtration to be granted to the next of kin on the ſuggeſtion of inteſtacy. On a motion to ſuperſede the mandamus, the court granted it; becauſe it appeared that a will was in conteſt in the prerogative court. According to lord Raymond, the whole court in this caſe agreed, that *the judge of the ſpiritual court is the only proper judge to determine the validity of wills for things perſonal, and therefore the probate is undeniable evidence to a jury*; and Holt ſaid, that he remembered a caſe at niſi prius in which lord chief juſtice Kelyng, evidence being offered to prove inteſtacy againſt a probate, told the jury *the probate was evidence uncontrovertible*; *and that afterwards it being moved by his order all the other judges concurred in opinion with Kelyng*; and Holt added, that *it had been ſo held ever ſince*. The words of Holt as reported in 12 Mod. are in ſubſtance the ſame; and the caſe he referred to was probably that of Noel and Wells, which happened a ſhort time before lord chief juſtice Kelyng's death. See King and Raines, 1 L. Raym. 262. and 12 Mod. 136.—Another caſe, in which the doctrine about probates became material, is an anonymous one of Mich. 5 Ann. in C. B. whilſt Trevor was chief juſtice. In *indebitatus aſſumpſit* by one as executor, defendant pleaded payment to A. B. who was executor under another will with probate; and plaintiff replied, that the probate granted to A. B. was afterwards annulled, and the will in his favour adjudged to be forged, and the will appointing plaintiff executor allowed, with a traverſe of the will appointing A. B. executor. On this replication there was a demurrer; and the court held, 1. that payment to an executor *de facto* having probate did not bind the rightful executor; and, 2. that the plaintiff's traverſe of the will appointing A. B. executor was good, notwithſtanding the probate of it. But the chief juſtice, in giving his opinion on this laſt point, conceded, that a probate was *evidence of ſo ſtrong a nature that no evidence ſhall be admitted againſt it.* See Com. 152.—The two next caſes relative to probates are the King and Vincent, Mich. 8 Geo. 1. in 1 Stra. 481. and the King and Rhodes, Trin. 12 Geo. 1. in 1 Stra. 763. In the former caſe a probate was held at the Old Bailey to be concluſive evidence of a will of perſonal eſtate in an indictment for perjury, notwithſtanding proof of the forgery before the probate was given in evidence. In the latter caſe an indictment for forgery of a will was ready for trial in the king's bench;

bench; but, on a motion for a habeas corpus *ad teſtificandum*, it appearing, that there had been a ſentence for the will which was in queſtion before commiſſioners of review, lord Raymond declared he would not try the cauſe till the ſentence was reverſed. I am aware that the caſe of the King and Vincent hath been thought a very ſtrange one by perſons, to whoſe judgment I defer in the higheſt degree; and further, that the preſent practice in our criminal courts is ſaid to be different; in proof of which is cited the caſe of one Sterling, who was convicted of forging a will, notwithſtanding probate, on the teſtimony of the ſuppoſed teſtator. But when I conſider the ſeries of ſolemn deciſions on which Vincent's caſe was founded, I own I cannot help approving of it, and that I am little moved by a deviation from it in an inſtance, which, as far as appears to me, was without argument, and perhaps more the conſequence of the court's being ſtruck by the groſſneſs of the caſe, than the reſult of ſerious reflection on the nature of a probate, or conſideration of the authorities by which its operation is ſuſtained. Beſides, the great objection to allowing a probate to be concluſive is, where it is granted in common form, and therefore ſeems to be ſcarce a judicial act; for where a probate is founded on a ſentence in a ſuit between adverſe parties, I think, that in point of general reaſoning there would be no room for complaining of the probate's being concluſive; and if a probate thus granted after litigation ought to be concluſive, the argument in favour of the concluſion of matrimonial ſentences will not be weakened. See 1 Ro. Rep. 21. where it is ſaid by Dodridge, that probate in common form is not binding.

To theſe caſes at common law concerning probates ſhould be added the reſpect ſhewn by courts of equity to the exerciſe of this ſpiritual juriſdiction; it being ſettled that they are equally bound by it with the courts of law, and therefore ought not to try in chancery the validity of a will of perſonalty either before or after probate. I will ſhortly mention the equity caſes to this purpoſe. —In the attorney-general and Ryder, 12 Oct. 1686, one ſued by bill for a legacy, and the executor ſet forth a revocation of the will; but the lord chancellor ſaid, *the will is under probate eccleſiaſtical, and I will not try it here; go to the eccleſiaſtical court and prove it there.* See 2 Cha. Caſ. 178. In Archer and Moſs, which was heard in June 1686, the lord chancellor refuſed to examine into a will of perſonal eſtate on account of fraud in obtaining it, there being a probate, and diſmiſſed the bill without hearing any proofs read. See 2 Vern. 8. Soon afterwards the ſame chancellor in another caſe, though he would not give aid to an executor by enforcing the truſts of a term, becauſe the will appeared to have been obtained by reſtraint and force; yet he at the ſame time allowed, that, as the will was proved in the ſpiritual court,

court, it could not be controverted in chancery. See Nelſon and Oldfield, July 1, 1686. 2 Vern. 76. In Plume and Beale, Mich. 1717. lord chancellor Cowper diſmiſſed a bill by an executor to be relieved againſt a particular legacy with coſts, notwithſtanding ſtrong proof of its being a forged interlineation; becauſe the will was proved in the proper court, and it might have been proved with a reſervation as to the diſputed legacy. See 1 P. Williams 388. See alſo Stephenſon v. Gardiner, 2 P. Williams 286. However, lord Macclesfield in Branſby and Kerridge ſet aſide a will of perſonalty for fraud, and made the executor a truſtee. But his decree was afterwards reverſed by the lords; and ſo it ſeems was another of his decrees of a like kind in Andrews and Powys. For lord Hardwicke in Barnſley and Powell ſays, *it is certainly now ſettled by the lords in Branſby and Kerridge, that this court cannot ſet aſide a will of perſonal eſtate for fraud, nor will I infringe on what is laid down there, and in Powys and Andrews, and in the caſe of Mr. Hawkins's will*; and in Bennet and Vade lord Hardwicke ſpeaks of the caſe of Powys and Andrews in like terms. See as to Branſby's caſe 1 P. Wms. 548. as to Powys and Andrews Vin. Abr. vol. 8. page 548, vol. 11. pages 59 & 66. Barnſley and Powell, 1 Vez. 287. Bennet and Vade, 2 Atk. 324. Nor is the relief given by lord Hardwicke in Barnſley and Powell in the leaſt inconſiſtent with the concluſive quality of a probate. The will in that caſe was both of real and perſonal eſtate; and as to the former, it had been found by a jury to be forged, and the plaintiff's conſent to probate had been procured by fraud; and upon the ground of this fraud, and not upon any ſuppoſition of a right to examine the validity of the will in contradiction to the probate, lord Hardwicke ordered the defendants to conſent to a revocation of the probate, and intimated, that if this ſhould not be conſented to, he ſhould go further, and make the executors truſtees. So too in Sheffield and the dutcheſs of Buckingham, though lord Hardwicke granted an injunction to reſtrain the dutcheſs from further controverting the will of her huſband, he proceeded in a way which leaves the peculiar juriſdiction of the ſpiritual courts as to probates unimpeached; for he founded the injunction on an admiſſion of the will by the dutcheſs in a former ſuit, in which it was decreed to be well proved; and he admitted, that *in an adverſary way the court of chancery or a court of law could not determine on the validity of a probate*. See 1 Atk. 630.

All theſe authorities, in reſpect to the force of a probate at law and in equity, being conſidered together, as on the one hand they indiſputably ſhew the ſole and peculiar juriſdiction of the eccleſiaſtical courts in the probate of wills, ſo on the other hand

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in my opinion they as clearly prove, that all acts done in the exercise of this jurisdiction are binding and conclusive on the temporal courts, and ought not to be subject to a re-examination by them. If any thing further was wanting to establish this proposition, some argument might be derived from the history of the practice in respect to prohibitions, where wills are of real as well as of personal estate. Formerly, when such a will was contested as to the land, it was usual to grant a prohibition for staying probate both as to the lands and goods; afterwards it was granted only as to the latter; and finally it was refused as to both. See 6 Co. 23. 1 Ro. Rep. 31. and 358. Comberb. 170. 2 Salk. 552. The ancient practice was only to prevent a prejudice to trial in the temporal court as to the land: the middle practice was founded on the inconvenience which might ensue if probate should be staid, the executor not being able to sue for debts without: the modern practice arose from its being settled, that probate was not evidence as to the land. But by each it was admitted, that the temporal courts could not examine into the validity of wills, so far as they related to personalty; and this sole jurisdiction over wills of the latter well accounts for the conclusive force of probates, where they are admissible in evidence. See 1 Cha. Cas. 80. 126. 192. the case of a perpetual injunction not to prove a will, it having been found forged.

2. *Causes for depriving clergymen* of their benefices form another branch of merely spiritual jurisdiction, except where acts of parliament give a concurrent one to the temporal courts; as is done in the instance of simony by the 31 of Elizabeth, which makes the living void, and is construed *de facto* a deprivation without sentence, and creates penalties recoverable in the temporal courts. Accordingly in Bird and Smith, the former having been inducted into a living on the deprivation of the latter by the commissioners for simony, but being disturbed by his proceeding in a writ of restitution awarded by the king's bench on an affidavit of forcible entry, the chancellor, by the advice of Popham and Coke chief justices, and Fleming chief baron, granted an injunction to restrain the proceeding at common law against Bird, till Smith had defeated the deprivation. The principle of this decision was, that the temporal courts cannot examine that which is decided by ecclesiastical judges in matters merely spiritual. The words of lord Coke in this case are uncommonly strong and expressive. *The law ecclesiastical*, he said, *is like to a sweet river running through beautiful meadows, which if it goes beyond its bounds and banks, annoys by drowning, and therefore ought to be corrected and reduced within them again. So if the law ecclesiastical exceeds its power, it should be reduced by*

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royal prohibition to its antient and true course. But so long as it doth not exceed its proper jurisdiction, its sentences are binding to our law, and are not examinable by it. To these words of Coke the reporter adds, that *all the judges agreed in the principal case, that the deprivation defeated the incumbency of Smith, and bound so strongly, that no examination of it can be by our law till the deprivation of it should be undone by the ecclesiastical law, which could not be, except by commission of review.* See Bird and Smith, Trin. 4 Jam. in Mo. 781. This decision proceeded on the same general principle concerning the credit due to the ecclesiastical courts whilst acting within the sphere of their jurisdiction, as had been before acted upon in Cawdrey's case, in which his deprivation by the high commissioners, for an offence against the act of Elizabeth for the uniformity of common prayer, appearing on a special verdict, was the ground of judgment against him in an action of trespass he brought to try the title to the rectory of which he had been parson. See Cawdery's case, Hill. 33. Elizabeth 5 Co. 1. The case of Philips and Crawley, in the common pleas, whilst Vaughan was chief justice, resembled Cawdrey's; for a sentence of deprivation in the spiritual court for simony being given in evidence against Phillips in trespass by him on part of his rectory, the sentence was ruled to be conclusive; and these two cases with that of Bird and Smith are the stronger, because in all three the deprivation was for causes, which for some purposes were by statute made the subject of temporal jurisdiction. See Phillips and Crawley in C. B. Pasch. 1763. 1 Freem. 83. The words of lord Hale and judge Twisden in the King and New-College quite accord with these determinations; for in reasoning against a mandamus to restore the fellow of a college, they observed, that *if the spiritual court deprives a man by sentence in a case where they have jurisdiction, the cause of it can never come in question in any temporal court in assize or otherwise, so long as it remains in force; but the temporal courts are bound by it.* See the King against New College in B. R. Trin. 23 Cha. 2. 2 Lev. 14.

3. The *deprivation and expulsion of members of colleges*, by the statutes of their founders, usually fall within the peculiar jurisdiction of the master and fellows in the first instance, and of their visitors by appeal, and sometimes of the latter originally; and it is now settled, that their sentences for these purposes are so conclusive to all other courts, that the justice of them is not examinable even in the king's bench, though it belongs to that court to controul them when they exceed the bounds of their jurisdiction. On this principle a mandamus to restore the fellow of a college hath been frequently refused: and in Phillips and Bury it was finally decided in parliament, that a sentence

of deprivation by the viſitor of a college was concluſive evidence in an ejectment for one of the college eſtates; and the judgment of the king's bench given by the opinion of three judges againſt Holt, and founded on the injuſtice of the ſentence, as it appeared from the facts of a ſpecial verdict, was reverſed. See Dr. Widrington's caſe in B. R. Eaſt 13 Cha. 2. 1 Lev. 23. Dr. Patrick's caſe in B. R. Eaſt. 14 Cha. 2. 1 Lev. 65. The King and New College Trin. 23 Cha. 2. 2 Lev. 14. and Phillips and Bury Trin. 6 W. & M. 4 Mod. 106. Skinner 447. 1 L. Raym. 5. Caſ. in Parl. 35. and 2 Stillingfleet's Eccleſ. Caſ. 411.—This caſe of Phillips and Bury appears to have been moſt elaborately argued, and the reports of it, particularly thoſe in Skinner, and the caſes in parliament by Shower, are full of very important matter on the effect of ſentences by courts of peculiar juriſdiction. It ſhould however be obſerved, that though in Phillips and Bury the ſentence was finally adjudged to be concluſive, yet many of the facts and circumſtances relative to the form and juſtice of the ſentence were allowed to be given in evidence againſt it, and are ſtated in the ſpecial verdict. But this might be owing to doubts on the effect of the ſentence; and in the late caſe of Mr. Crawford, the court of king's bench approved of refuſing ſuch evidence againſt a ſentence of expulſion from a college.*

4. The *condemnation of ſhips* taken in war uſually belongs to the admiralty court of the ſtate of which the captor is a ſubject; and there are ſeveral caſes in which the ſentences of ſuch courts have been received as concluſive to all other courts in which the queſtion of property hath afterwards occurred; and in theſe caſes no difference is made, whether the ſentence was given by a foreign or our own court of admiralty†.—The earlieſt caſe of this kind I meet with is that of Hughes and Cornelius, cited by lord chief juſtice Holt as one in which he was counſel. It was trover for an Engliſh ſhip, which was taken by the French admiralty and ſold to plaintiff; and on the trial before lord Hale a ſentence of the admiralty of France was produced, and there was a ſpecial verdict finding the ſentence, and that the ſhip was Engliſh; but notwithſtanding this contradiction of the ſentence, the court held the property bound by it, and the plaintiff recovered. See 2 L. Raym. 893. and S. C. cited by the court in Carth. 32.—The law of niſi prius mentions the caſe of an action on a policy of inſurance of a ſhip with warranty that it was Swediſh, in which a ſentence of the French admiralty court, con-

* Mr. Crawford's caſe is now in print, being reported by the name of *Rex v. Grundon and others*, in a collection with which the public hath been juſt favoured. See Mr. H. Cowper's Reports of Caſes in the King's Bench 315.

† See in the Preface to this volume ſome obſervations concerning the juriſdiction of the judge of the admiralty in prize cauſes.

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demning the ſhip as Engliſh, was held to be concluſive evidence. See law of niſi prius, ed. of 1775, page 224.—In Burke and Tyrrel or Thyrwit in B. R. which was firſt argued Eaſt. 4 Jam. 2. but was not adjudged till Eaſt. 1 W. & M. the ſentence of an Engliſh court of admiralty, condemning the ſhip as a prize, was pleaded by the captor in bar to an action for the ſame ſhip; and plaintiff demurred; and though judgment was given for the plaintiff, yet it was merely becauſe it was not ſet forth that there was a war, and for other defects in the manner of pleading; and in the argument it ſeems to be taken for granted, that if the ſentence had been properly pleaded, it would have been a good bar. See 3 Mod. 194. Carth. 31 & 1 Show. 6. Accordingly ſoon afterwards in Green and Waller, the ſentence of an Engliſh court of admiralty, being well pleaded, prevailed on a demurrer. But it is only for the ſake of the general doctrine of lord Holt, that I cite this laſt caſe; for the concluſion allowed to the ſentence in the caſe itſelf would prove little, it being the effect of the party's own agreement; for the defendant, againſt whom the ſentence was pleaded, had given a bond to the plaintiff with condition to deliver the ſhip if the law ſhould adjudge it to be a prize, and the action was brought for breach of this condition. See 2 L. Raym. 891*.

5. So again the court of exchequer and the commiſſioners of the exciſe having a peculiar juriſdiction for the *condemnation of forfeited goods*, the determinations of both are concluſive evidence in actions brought to try the property of the ſame goods in other courts.—The law of niſi prius cites a caſe, in which a judgment of the exchequer on an information for a forfeiture was allowed to have this effect†; and in Mr. Ford's manuſcript

* Within the laſt two or three years ſeveral caſes have been brought before the king's bench, in which it was eſſential to conſider accurately the effect of ſentences of admiralty courts on queſtions of prize; and the opinion of the king's bench in each of theſe caſes ſtrongly tends to juſtify the uſe here made of the former precedents on this ſubject. See Bernardi v. Motteux, Dougl. Rep. 554. Caux v. Eden, ibid. 572. Lindo v. Rodney and another, ibid. 591. in a note, and Michell and Gay v. Rodney and Vaughan, ibid. 597. in a note. This laſt caſe was lately heard before the lords on a writ of error; and the judgment of B. R. was affirmed after taking the opinion of the judges.

† See accordingly the opinion of the court of common pleas in the caſe of Scott againſt Shearman and others in the common pleas, as reported in 2 Blackſt. 977. In this caſe the concluſiveneſs of the judgment equally concluded *in perſonam* of the owner of goods condemned. At firſt Mr. juſtice Blackſtone inclined to favour its not being concluſive for the latter purpoſe. But he afterwards concurred with the reſt of the court againſt ſuch diſtinction, and held the judgment univerſally concluſive, ſupporting this change of ſentiment, not only by ſtrong reaſoning from the nature of the exchequer proceedings for the condemnation of forfeited goods and from analogous caſes, but by a variety of direct deciſions of the point.

there is the note of a case of a like kind as to a condemnation of tea by the commissioners of excise under the 10th Geo. I. chap. 10. sect. 16. though the plaintiff was not party to the proceeding before the commissioners. See the law of nisi prius ed. of 1775, page 244, and Mr. Ford's note of Roberts and Fortune* before Lee chief justice at the Guildhall sittings after Easter term 1742†.

6. The cases of Lane and Deyberg, before lord chief justice Treby in Hill. 11 W. 3. cited in the law of nisi prius, but more fully stated in one of Mr. Ford's manuscripts, and the case of Moody and Thurston, 8 Geo. I. before lord chief justice Pratt at nisi prius, furnish two other instances of the force of acts in the least judicial, when done by persons invested with a peculiar

* Mr. Ford's note of this case is as follows:—"In trover for 54lb. of tea; it "appeared in evidence, that plaintiff sent the tea for one Lloyd, with a *per-* "*mit*, but the porter in his way called at the house of one Rocheliffe, where hav- "ing set down his burthen, the defendant, who was an excise officer, seized it as "forfeited on being brought to Rochcliffe's house for R's. use, without a *permit* to "that place, according to the 10th Geo. I. cha. 10. sect. 16. Upon not guilty "pleaded, defendant, to shew the property was out of the plaintiff, produced a "condemnation by the commissioners of excise upon an information against Roch- "cliffe for receiving this tea without a *permit*, which it was insisted was conclu- "sive evidence of that fact, being a judgment before a proper jurisdiction. On "the other side it was insisted, that plaintiff was no party to the suit; that Roch- "cliffe had nothing to do with the tea; and that if she made a feigned defence, or "as the cause was made default, yet plaintiff ought not to be affected by that, "but should shew this was such a case as no forfeiture arose.—But *per* Lee chief "justice, the judgment of forfeiture is a judgment on the thing itself. How the "tea came to Rochcliffe's house was a matter proper for the consideration of the "commissioners; and if Mrs. Roberts, the plaintiff, was willing to have defend- "ed the suit, she might have come in *pro interesse suo*, which not doing her proper- "ty is bound; and that there is no more in this than the common case, viz. that "courts of law pay such deference to the judgments of each other in matters with- "in their jurisdiction, that the first determination by a proper authority ought to "prevail. So then the tea being forfeited, the property could not be in the plain- "tiff, who was therefore non suited.—*Roberts* against *Fortune*, at sittings after "Easter term at Guildhall, 1742."

† But since the writing of this argument the reports by a late judge, of whose writings the editor has elsewhere had frequent occasion to express his admiration, have been published; and in them there is a case, according to which a condemnation by the commissioners of excise differs from a judgment of forfeiture in the exchequer, and is not conclusive in an action of trespass for the same goods, but mere evidence to the jury. See Henshaw v. Plaisance and others in the common pleas, Mich. 18 Geo. 3. 2 Blackst. 1174. This case is a direct contradiction of that of Roberts v. Fortune and others, before lord chief justice Lee. Which of the two opinions deserves the preference, the editor will not presume here to enquire. *That* of the common pleas has the advantage of being a more recent authority, and also not only being more solemn, but of coming from the whole court, whereas the other opinion was that of a single judge sitting at nisi prius. On the other hand, it is a justice due to this latter authority, to remind the reader, that there are two reported cases of the exchequer, whilst lord Hale presided there, both of which contain very strong grounds of argument in favour of lord chief justice Lee's doctrine, though neither is an absolute decision of the point. See Hard. 478. 480. It also seems well worthy of notice, that in the argument of the case reported by Mr. justice Blackstone, there is no reference either to the two cases in Hardres, nor to the case before lord chief justice Lee.

liar authority.—In the former caſe the action was brought for maihem, in cutting off the plaintiff's arm; and defendant juſtified by pleading, that it was done in correction, according to *martial law*, for breach of duty, whilſt plaintiff was under defendant's command as his officer, and the regiment was marching againſt the enemy; to which the plaintiff replied *de injuriâ ſuâ propriâ*; and on the trial the ſentence of a court martial on a complaint by plaintiff was received as concluſive evidence of the juſtification. See law of niſi prius ed. 1775, page 245, and Mr. Ford's manuſcript.——The latter caſe aroſe on an act of parliament for ſtating army debts, which authoriſed commiſſioners to ſummon officers and agents, and where any money was due from one to another, to give a certificate, on which action might be brought as on a ſtated account; and an action being brought on ſuch a certificate, lord chief juſtice Pratt allowed it to be concluſive, and refuſed to receive evidence againſt it. See 1 Stra. 481.—But theſe two caſes, and others of a like kind, which happening at niſi prius might be decided without much conſideration, I cite more on account of their conformity to the general principle of the more ſolemn determinations, than in reſpect of their own intrinſic authority. Beſides, in Lane and Deyberg and in Moody and Thurſton, the ſuits at law being between the ſame parties as the former proceedings were, they do not apply ſo ſtrongly as moſt of the inſtances I have mentioned.

7. As to Burrows and Jemineau, in 2 Stra. 733, I do not cite it as an authority, becauſe I think the deciſion turned on a principle foreign to the preſent purpoſe. In that caſe lord chancellor King granted an injunction to ſtay proceedings in an action againſt the acceptor of a bill of exchange, who had been already diſcharged of the acceptance by ſentence of a court at Leghorn. But this is only an authority to prove the concluſive quality of a ſentence by one court of *concurrent* juriſdiction in a ſuit relative to the ſame ſubject in another court between the ſame parties.

8. Nor do I infer much from the caſes of Webb and Cook, or of Thornton and Pickering, and of Boyle and Boyle. In the firſt caſe a prohibition was granted to ſtay a ſuit in the eccleſiaſtical court for ſaying that one had a baſtard, becauſe the perſon ſuing there for this defamation had been ordered by the juſtices at their ſeſſion to keep the baſtard, and their ſentence founded on a ſtatute was adjudged to be concluſive to the ſpiritual court. See Cro. Jam. 535. and 625. In Thornton and Pickering a prohibition was granted on the ſame account. See 3 Kebl.

Kebl. 200. In Boyle and Boyle a prohibition was granted by two judges againſt Powel, to ſtay a ſuit againſt a woman for jactitation of marriage, the man ſuing there having been already convicted of polygamy for marrying the ſame woman whilſt he had a former wife living. See this laſt, which was of Hill. 3 Jam. 2. in Comberb. 72. & 3 Mod. 164. All theſe caſes will probably be cited for the lady, ſhould the concluſive operation of the ſentence in her favour be denied. But I do not lay much ſtreſs on them, becauſe they might perhaps be founded on the right of the temporal court to reſtrain the ſpiritual court from contradicting that which hath been already finally decided upon by temporal judges, under an authority expreſsly given by acts of parliament.

Such are the numerous authorities on which I found my notion of the concluſive quality of ſentences by courts having a peculiar juriſdiction; and ſo convinced have I been from the beginning, as well of the general doctrine's being perfectly ſettled, as of its application to the preſent caſe, that I ſhould have deemed it unneceſſary to have thus expatiated on the ſubject, if I had not repeatedly heard both queſtioned by perſons, whoſe doubts upon moſt occaſions would ſtrongly influence my judgment, though I cannot yield to them in the preſent inſtance. The manner, in which I have endeavoured to methodize and apply the caſes, takes by anticipation all the objections uſually made, and, as I cannot help thinking, evinces their inſufficiency. However, I will conſider them ſingly.

It is ſaid, that the ſentence in the preſent caſe being *contra matrimonium* hath not the effect of a thing finally adjudged, or, according to the language of the civilians and canoniſts, *non tranſit in rem judicatam*; and that as it would not be concluſive to a ſpiritual court, therefore it ought not to be ſo to the temporal one. This objection is founded both on the general rule as to ſentences *contra matrimonium*, and the words *ſo far as it yet appears to us*, which in the ſentence in queſtion follow the declaration that the lady was free from matrimonial contract.—I admit the rule to be as ſtated, not merely becauſe it is to be found in Oughton's Ordo, the book ſometimes cited to prove it, that being a book chiefly of weight as to the form of proceeding in ſuits; but on the authority of thoſe doctors of the civil and canon law, who have written generally *de ſententiis et re judicata*, as Scaccia and Heraldus, eſpecially the former, or have particularly treated of the effect of matrimonial ſentences, as Gaill, Covarruvias, Sanchez, and others without number. *Regulariter* as Gaill writes in a chapter on this ſubject, *ſententia in cauſis matrimonii non tranſit in rem judicatam, ſed revocatur quandocunque error.*

error detectus fuerit. Sed ut hoc exactius declaretur, distinguendum est, utrum sententia lata sit contra matrimonium. Primo casu nunquam, ut dictum est, transit in rem judicatam. Secundo casu subdistinguendum, utrum sententia lata sit pro matrimonio quod tamen, obstante aliquo impedimento, ut puta quia in gradu prohibito contractum, subsistere non potest, et tunc similiter non transit in rem judicatum. See Gall. Practic. Observat. lib. 1, observ. 112. According to this passage, which I cite, because it gives the whole rule concisely, and as I believe accurately, though not the reasons of it, sentences for marriage are sometimes final and sometimes otherwise, but those against matrimony are universally not final; which latter part of the rule however must be understood only to leave a right to re-agitate the question of marriage in a new suit; for after lapse of the time for appealing, the sentence itself is not reversible; even the sentence against marriage being so far definitive, and that for the lady in the present case being so denominated in the former words of it. But it is a sufficient answer to the objection drawn from this rule, that the cases in our books prove it to be merely applicable in the spiritual courts. In Kenne's case the sentence was *contra matrimonium*, and it was argued against on that account; but without success. The sentences in Jones and Bow, in Hatfield and Hatfield, in Clewes and Bathurst, and in Da Costa and Villa Real, were also *contra matrimonium*. As to the word *so far as it appears to us*, if they are not mere forms, at the utmost they import nothing more than the general doctrine as to sentences against marriage; and the adjudged cases equally answer the objection as to both.

Another object is, that though the sentence, so long as it remains in force, may bind the lady and gentleman who were the parties, *strangers* ought not to be affected.——But the cases of Bunting and Lepingwell and of Hatfield and Hatfield are direct precedents against this objection; for in both of them the sentence was used in the temporal court to the prejudice of strangers. It is also answered by the other cases, in which the temporal courts have received matrimonial sentences as conclusive evidence, without regarding what their effect might be before a court of spiritual jurisdiction, and where they would not have been conclusive in the latter even as against parties. This makes it unnecessary to consider here, how far the rule that *res inter alios acta tertiis nec prodest nec nocet* applies to matrimonial causes. Should such a discussion be entered into, it might be material to recollect, that the operation of certificates from the ordinary to the temporal court is conclusive to strangers as well as parties and privies on the points of marriage and bastardy,

and

and was ſo on the point of *profeſſion* whilſt that continued to be noticed by our law. See Fitzh. Abr. *eſtoppel*, pl. 182. Bro. Abr. *eſtoppel*, pl. 78, & 179.

It may be alſo objected, that the *intereſt of the king* is not bound by judgments on ſentences in ſuits between private perſons; and therefore that the ſentence ought not to be concluſive in proceedings to which he is a party, as he is in an indictment; and to ſuſtain this objection, it may be obſerved, that verdict for the defendant in treſpaſs *vi et armis* will not conclude in an indictment for the ſame treſpaſs, and according to ſome opinions cannot even be given in evidence; though in this laſt reſpect the authorities do not agree. See 12 Mod. 339, 319.—But this objection, as it ſeems to me, proceeds from the want of due attention to the principle, on which the effect of matrimonial ſentences is founded; they being concluſive to the temporal courts, not in reſpect of the perſons for or againſt whom they are pronounced, or by or againſt whom they are pleaded, but wholly on account of the *peculiar juriſdiction* of the ſpiritual judge over the ſubject of marriage. If this was not the reaſon, they would not operate againſt common ſtrangers in the temporal courts, nor could even parties be bound where the ſentence was *contra matrimonium* and therefore not final in an eccleſiaſtical court. However I confeſs, that the authorities againſt this objection do not apply ſo ſtrongly in *letter* as in *principle*: for I do not at preſent recollect any caſe, in which a ſentence or judicial act hath been adjudged to be concluſive in a temporal court of *criminal* juriſdiction, except the caſe of the King v. Vincent, 1 Strange's Reports, 481, in which the probate of a will was allowed to have that effect on an indictment for forgery of the will.

Sometimes I have heard it inſiſted upon, that ſentences of the eccleſiaſtical courts in matrimonial caſes are not concluſive in the temporal courts; becauſe in them the ſuit is *diverſo intuitu*.—A like ſort of argument was lately urged before the lords, on an appeal from chancery in the caſe of Bouchier and Taylor, againſt a ſentence of the ſpiritual court in a cauſe of *adminiſtration*. In that caſe Alice Merchant as firſt couſin, and Dr. Bouchier as firſt couſin once removed, had been competitors in the prerogative court for adminiſtration to Mrs. Millington an inteſtate; and Alice Merchant dying during the ſuit, her executors became parties, and a ſentence was at laſt pronounced, declaring that they had failed in proving her next of kin, and therefore directing adminiſtration to be granted to doctor Bouchier. Several years after Taylor, who was Alice Merchant's reſiduary legatee, and not a party to the ſuit about adminiſtration, filed a bill in chancery againſt doctor Bouchier for a diſtribution; and

though

and though he had pleaded the ſentence, the preſent maſter of the rolls granted an iſſue to try, whether Alice Merchant was next of kin, and his order was confirmed by the lord chancellor. But Dr Bouchier appealed to the lords; and before them two points were made; one being, whether the ſentence of the eccleſiaſtical court was not concluſive; the other, whether the ſpecial circumſtances of the caſe did not make an iſſue improper*. On the hearing the decree was reverſed on both grounds, without the leaſt oppoſition by the lord chancellor or any other lord. And lord Mansfield, who was the only ſpeaker on the ſubject, in his reaſons againſt the decree, was clear, that the ſentence was

* The reaſons for the appellants in Bouchier and others v. Taylor which, with the other parts of the caſe of the appellant, were written by the editor as junior counſel for Dr. Bouchier, have conſiderable connection with the ſubject of this argument; and as few perſons are poſſeſſed of the caſes in parliament, it may not be amiſs to inſert ſo much of thoſe reaſons as is here applicable. The part of the reaſons, which appears to the editor to be here material, was thus expreſſed;

"There are *two* general grounds, on which, as the appellants conceive, the "iſſue to try, *whether Alice Merchant was the couſin-german and next of kin to the in-* "*teſtate Ann Millington*, ought to have been refuſed. *One* is, that the ſentence of "the eccleſiaſtical court, by which the letters of adminiſtration were granted to "the appellant Dr. Bouchier, excludes the court of chancery from the power of "directing an iſſue. The *other* is, that if the court had the power, yet, under "the particular circumſtances of the preſent caſe, it ought not to have been ex-"erciſed in favour of the reſpondent. It will be proper to view the caſe in *both* "of theſe lights.

"I. It muſt be conceded, that, ſo far as regards the granting of *adminiſtration* "and all ſuits for conteſting the right to it, the ſpiritual courts are poſſeſſed of a "*ſole* and *excluſive* juriſdiction. Another thing equally uncontrovertible is, that "the ſame courts have alſo a juriſdiction in reſpect to the *diſtribution* of *inteſtates* "effects: but this differs from the *former*; becauſe it is merely *concurrent*, the "court of chancery having a juriſdiction over the *ſame* ſubject. From theſe two "poſitions flow the objections to the court of chancery's power of interference in "the preſent caſe; for on an inveſtigation into the conſequences, which muſt "ariſe from ſuch an interference, it will appear to operate, both as an *invaſion* of "the ſpiritual court's *ſole* juriſdiction, and as an *undue controul* of its *concurrent* one.

"In the ſuit in the ſpiritual court, about the right to *adminiſter* to Mrs. Ann "Millington, the queſtion was preciſely the ſame, as that which the reſpondent "now wants to litigate in the bill he hath brought in chancery for the benefit of "a *diſtribution*. Had Dr. Bouchier and Alice Merchant claimed the adminiſtration "to Mrs. Millington as her relations in *equal* degree, the eccleſiaſtical judge "would have had a right to prefer Dr. Bouchier, on the ſuppoſition that his pe-"digree was not controverted, or being controverted was well proved, without "coming to any deciſion on the relationſhip ſet up by Alice Merchant; and if the "judge had proceeded on that principle, her claim would have been unimpeach-"ed, and as open to litigation in a ſuit for diſtribution, either in the ſame court "or in the court of chancery, as if Dr. Bouchier had never obtained the admini-"ſtration. But the caſe, which really exiſted, was quite of a different kind, "According to the pedigree, on which Alice Merchant founded her pretenſions, "ſhe was *firſt couſin* to the inteſtate, whereas Dr. Bouchier only claimed to be her "*firſt couſin once removed*; and this inequality of claimed relationſhip rendered it "impoſſible to avoid pronouncing ſentence on Alice Merchant's pedigree; be-"cauſe,

was concluſive, notwithſtanding the difference, in points of objects between the two ſuits; and that the court of chancery, in exerciſing its concurrent juriſdiction as to diſtribution, was con-

" cauſe, if it was true, it was beyond the ordinary's power to give the admini-
" ſtration to Dr. Bouchier. The conſequence of this in argument ſeems deciſive
" againſt the juriſdiction of chancery over the cauſe of diſtribution inſtituted by
" the reſpondent. The object of the reſpondent's proceedings in chancery is to
" have Alice Merchant declared the next of kin to Mrs. Ann Millington at her
" death; but this object cannot be attained without contradicting the ſentence of
" the eccleſiaſtical court, which declared, that Turſt and Jobber, the executors
" of Alice Merchant, had failed in proving her the next of kin, and therefore gave
" the adminiſtration to Dr. Bouchier. Should ſuch a contradiction be allowed
" of, it would wholly counteract the deciſion of the ſpiritual judge, by diſap-
" pointing Dr. Bouchier and thoſe in the ſame intereſt of the fruits of that deciſion,
" and by depriving them of the diſtribution, to the benefit of which they other-
" wiſe would *neceſſarily* be intitled. Thus under colour of exerciſing a juriſdiction
" in a queſtion of diſtribution, the court of chancery would *indirectly* impeach and
" ſubvert the foundation of the ſentence granting adminiſtration, and prevent its
" *beneficial* conſequences to the appellants; and therefore would in *effect* invade
" the *ſole* juriſdiction of the ſpiritual court in point of adminiſtration, as much as
" if it was to repeal the adminiſtration itſelf†.

" Further, it is proper to conſider, that, as in the preſent caſe the queſtion de-
" termined by the ſentence in the ſuit about *adminiſtration* was the ſame as if the
" ſuit had been for *diſtribution*, ſo the effect of it ought to correſpond, and be the
" ſame in point of *concluſion*; becauſe the principle, on which a ſentence in one
" ſuit for diſtribution operates as a bar to another for the ſame purpoſe, is, that
" the ſame perſon ſhall not try the ſame queſtion in reſpect to the ſame ſubject in
" two different ſuits: and this applies equally to a ſentence in a ſuit for admini-
" ſtration, when the point adjudged is the ſame, as it would have been if the par-
" ties had conteſted about diſtribution. Accordingly in the eccleſiaſtical court
" this would be the effect of ſuch a ſentence granting adminiſtration, and there
" it would be pleadable in bar to a ſuit for diſtribution; and the effect ought to
" be the ſame in chancery, both on account of the juſtice and reaſonableneſs of the
" rule, and for the ſake of producing uniformity in the exerciſe of concurrent
" juriſdictions. The ſentence, granting adminiſtration to Dr. Bouchier, being
" then to be conſidered as a ſentence in a ſuit for diſtribution, it ſcarce can be
" contended, that ſuch a ſentence would not be a bar to a ſecond ſuit for diſtri-
" bution, though inſtituted in another court; for that would be arguing for a
" right to reſort to two concurrent juriſdictions ſucceſſively for the trial of the
" ſame queſtion, and if allowed of, would give occaſion to claſhing and contra-
" dictory determinations; and the court *laſt* applied to could not proceed with
" any effect, without preventing the execution of the ſentence of the court *firſt*
" applied to; which would be aſſuming a moſt unreaſonable controul over a
" court having equal cognizance of the cauſe, and in fact would amount to an
" exerciſe of appellant juriſdiction.

" At the hearing before the preſent lord chancellor it was objected, that, Alice
" Merchant being dead at the time of the ſentence in the eccleſiaſtical court,
" Dr. Bouchier was then become as near of kin as any other perſon, and there-
" fore it was competent to the ſpiritual judge to prefer him to the adminiſtration,
" without deciding any thing as to diſtribution. But this objection is without the
" leaſt foundation: for it was ſettled ſoon after the ſtatute of diſtribution, that the
" right to adminiſtration, which exiſts *at the death of the inteſtate*, is *tranſmiſſible*;
" and that the repreſentatives of that perſon, who was *then* next of kin, have

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† On a bill for diſtribution of an inteſtate's effects before lord Hardwicke, he held himſelf concluded by a ſentence of the eccleſiaſtical court granting adminiſtration. Thomas v. Ketteridge 1. Veſ. 333. The editor was not apprized of this caſe when he wrote the reaſons for Dr. Bouchier's appeal.

concluded by ſentences of the ſpiritual court in granting adminiſtration, and not at liberty to re-examine the points decided in the exerciſe of that peculiar juriſdiction. Indeed before I heard lord

" the ſame right to it, as ſuch perſon if living would himſelf have†. The ſen-
" tence granting the adminiſtration to Dr. Bouchier is full evidence of the prac-
" tice of the eccleſiaſtical court in this reſpect; for, as a foundation for giving
" him the adminiſtration, the ſentence *previouſly* declares, that the executors of
" Alice Merchant had failed in proving her next of kin; from which it muſt be
" inferred, that, if they had not ſo failed, the adminiſtration would have been
" granted to them.

" It may alſo be objected, that the reſpondent was not a party to the ſuit in the
" eccleſiaſtical court, and therefore ought not to be bound. But there is an ob-
" vious anſwer to this. Turſt and Jobber, the executors of Alice Merchant, as
" truſtees for the reſpondent and all others beneficially intereſted under her will,
" were the proper perſons to conteſt with Dr. Bouchier; and the reſpondent, as
" reſiduary legatee of Alice Merchant, is as much bound by the event of the ſuit
" with her executors, as if he had been a party; unleſs he can ſhew, that the
" executors pleaded *faintly*, or in any manner carried on the ſuit *colluſively*. Exe-
" cutors are ranked by the civilians amongſt the *legitimi contradictores*, that, is,
" perſons, who, having the *primary* and *principal* right, may proſecute or defend
" ſuits ſo as to conclude others, whoſe right are of the *ſecondary* and *dependant*
" kind; which is the reaſon for allowing ſuch third perſons to intervene. A wri-
" ter of great authority on the civil law, in explaining where *res inter alios actâ*
" ſhall bind third perſons, ſays, *ſuâ naturâ ac propriâ vi nocet vel prodeſt ſententia aliis,*
" *quàm inter quos lata eſt, quoties lis tractatur cum legitimo contradictore, à quo cæteri jus*
" *ſuum tanquam à fonte derivant ac recognoſcunt.* (*Erici Mauritii Diſſertatio de Jure*
" *Intervenientis. Vid. ſect.* 15.) He next explains the term of *legitimus contradic-*
" *torem appellamus, unde præjudicium vel commodum, quod ex tali ſententia quoad tertium*
" *aboritur, dicimus plenius eſſe, atque rei, etiam quoad hunc, judicatæ vim obtinere; neque*
" *enim tertio, qui innititur juri legitimi contradictoris, eoque ad cauſam ſuam uti neceſſe*
" *habet, eandem quæſtionem denuo retractare licet.* The ſame author then proceeds to
" illuſtrate the doctrine by examples; and amongſt them we find the caſe of an
" *hæres factus* or *ſcriptus*, who ſo far as concerns the perſonal eſtate partly anſwers
" to an *executor* amongſt us, and legatees; in reſpect to whom he ſays, *pariter ſi*
" *ſcriptum*

† Lord Mansfield, though he aſſerted the concluſiveneſs of the ſentence granting the adminiſtration to Dr. Bouchier, denied this particular poſition. His lordſhip ſaid he remembered arguing a caſe before Dr. Lee as judge of the prerogative court, in which, after great conſideration, the latter held the right to adminiſtration not to be tranſmiſſible as above deſcribed, but to be grantable to the next of kin for the time being. A caſe to the ſame effect before the delegates was cited in chancery by lord Mansfield when ſolicitor-general; and lord Hardwicke allowed the practice of the eccleſiaſtical court to be ſo ſettled as to *adminiſtration*, though he decreed for a *diſtribution* in favour of a huſband's repreſentatives on the principle of *tranſmiſſibility* from him as the perſon intitled to adminiſtration at the time of his wife's deceaſe. Collier v. Elliot, 1 Wilſ. 168. 1 Veſ. 15. 3 Atk. 526. Theſe authorities are certainly intitled to a very great reſpect. But on the other hand there are caſes according to which the *right of adminiſtering ought to follow the right to the eſtate.* In one caſe Sir Joſeph Jekyll maſter of the rolls is repreſented to ſay, that this point had been ſo ſolemnly determined by the ſpiritual court. Bacon v. Bryant, Eaſt. Vac. 1729. in 21 Vin. Abr. 88. The ſame doctrine is aſſerted by the reporter in 1 P. Wms. 382. and by lord Macclesfield in Cha. Prec. 567. and by lord King in a caſe in 11 Vin. Abr. 87. pl. 24. The practice alſo of granting adminiſtration to the reſiduary legatee, in preference to the next of kin, ſeems to be an additional authority on the ſame ſide; for it proceeds on the idea, that the ſtatutes, requiring adminiſtration to be granted to the next of kin, were made with a view to their benefit, and therefore become inapplicable when the next of kin cannot in any event be entitled to the ſurplus of the eſtate to be adminiſtered. See further 2 Str. 1111.

lord Mansfield, I was convinced of the doctrine, particularly in respect to matrimonial sentences, as to wonder at the countenance given by persons of great respectability to the contrary notion, which to

" *scriptum hæredem superaverit is, qui legitimam vindicabat hæreditatem, etiam legatariis* " *ac fideicommissaris nocebit sententia, ut demonstrat Papinianus; totum enim legatorum jus* " *dependet ab institutione hæredis, unde vires capit testamentum, quæ, an rectè se habeat* " *vel non, inter scriptum et legitimum hæredem disquiri debet. Cui quidem quæstioni hodie* " *locus tantùm foràt, si ex alto capite, quàm injustâ præteritione vel exhæredatione libero-* " *rum vel parentum, testamenti jus impugnatur; his enim casibus, annullatâ institutione,* " *cætera servantur.* If then, as in the case here supposed, sentence against the executor in respect to the constitution of the will itself, on which the right to the whole property of the testator depends, is binding upon the legatees; *á fortiori* ought a sentence, which as in the present case, only decides as to a *part* of the property claimed under Alice Merchant's will, to be so. But it is not peculiar to the civil law, or the practice of our ecclesiastical courts, that sentence against an executor binds the legatees; for in this instance our temporal courts adopt a like rule. Decrees in chancery against executors are conclusive against legatees and all others *beneficially* interested in the personal estate, though the latter are not parties to the suit, unless the executors plead faintly or *collude*; and judgments against executors in the courts of common law have a like effect, though in them legatees *cannot* be parties. Nor can the respondent reasonably complain of any *hardship* in applying the rule to his case. He cannot alledge *ignorance* of the pendency of the suit there; for it appears by the second supplemental bill, and by the answer to it, that he had correspondence with Dr. Bouchier on the subject soon after the death of the intestate, Mrs. Ann Millington; and the truth is, that he was a most active person in the affair from the beginning, which is proved by several of the witnesses examined for Turst and Jobber in the ecclesiastical court, who deposed that they gave their evidence at the instance of the respondent. If the respondent had been dissatisfied with the manner in which Turst and Jobber litigated the affair, by the rule of the ecclesiastical court he might have *intervened* by an allegation *pro interesse suo*, and so have made himself a party to the suit. As to feint pleading or collusion, it is not so much as suggested by the respondent, that either was imputable to Alice Merchant's executors in their suit with Dr. Bouchier.

" It may also be objected, that Turst and Jobber, against whom the sentence of the ecclesiastical court was pronounced, refused to prosecute an appeal, and suffered the fifteen days, allowed for that purpose, to elapse without using the opportunity, and that the respondent not being party to the suit, an appeal could not be carried on by himself; and therefore that it would be very hard to conclude and bind him by a sentence, from which he was not at liberty to appeal. But it should be recollected, that mere hardship will not vary the *legal effect* of a sentence in the ecclesiastical court; and upon *that* it is, that the question, whether the court of chancery hath the power to grant an issue, must turn. Besides, if there is any hardship in the case, it hath intirely proceeded from the respondent's own conduct, and he hath brought it upon himself. The suit in the ecclesiastical court, between Dr. Bouchier and the executors of Alice Merchant, was pending seven or eight years after her death; and during the whole of that time the respondent was at liberty to have made himself a party, and if he had done so, he would have had the same right to an appeal as if he had been a party from the beginning.

" As another objection it may be urged, that lord chancellor Northington's order, on the plea of the appellants to the jurisdiction, having been acquiesced in by answering, it is now too late to use the sentence of the ecclesiastical court, either as excluding the jurisdiction of chancery, or as a bar to the relief prayed by the respondent. But on attending to the words of lord Northington's [illegible], it appears, that so far from deciding upon the effect of the sentence and overruling the plea, he only ordered that it should stand as an answer with liberty for the respondent to except to it, *and expressly reserved the benefit of the plea till*

" *the*

to me ſeems irreconcileable with all the precedents. Not only all the caſes of marriage, but thoſe of probate and adminiſtration, thoſe of deprivation, the admiralty and revenue caſes, and finally thoſe of ſentences by courts martial; in fewer, words, the whole ſeries of authorities relative to the operation of ſentences and judgments by courts of peculiar juriſdiction is repugnant to this idea; for in all the ſentences I refer to, the ſuits in which the judgments and ſentences were pleaded or offered in evidence, particularly in the matrimonial caſes, were unavoidably *diverſo intuitu*. Lord Hardwicke, when in Mendez and Villa Real this was preſſed as an objection to receiving a ſentence againſt marriage as concluſive, treated it much in the ſame way, his anſwer being, that *the end and intention can ſeldom be the ſame in the eccleſiaſtical and temporal courts, the one being for a ſpiritual and the other for a temporal conſideration.* See Rep. in B. R. temp. Hardw. by lord Annally 19.

Another argument againſt the concluſive quality of the ſentence in this caſe may be framed in this manner. It may be ſaid, that the act of the firſt of James the firſt, on which the lady is indicted, having given to the temporal courts the trial of polygamy, they ought, ſo *far* as regards that offence, to be conſidered as having a *concurrent* juriſdiction over queſtions of marriage with that ſpiritual court; and that if they are concurrent, the inference from the determined caſes, which chiefly depends on the ſuppoſition of a peculiar juriſdiction, wholly fails; and then it will only remain to ſhew, that the ſentence would not conclude a ſpiritual court of concurrent juriſdiction.—This appears to me the moſt plauſible objection which can be urged againſt the ſentence; and if the temporal court ſhould be deemed to be on the ſame footing with a ſpiritual court of concurrent juriſdiction, it would give great advantage to the lady: for fixed as my opinion is on the effect of the ſentence conſidered as the ſentence of a *peculiar* juriſdiction, I have my doubts as to its effects on a *concurrent* one. But I muſt add, that I do not myſelf conſider the act of James as giving to the temporal court an equal and concurrent juriſdiction over the legality of marriage. On the contrary, my opinion is, that the legiſlature meant to leave the peculiar juriſdiction of the ſpiritual courts undiminiſhed, and only to authorize the temporal courts

" *the hearing.* By this manner of proceeding his lordſhip, though he held the ſen-
" tence inſufficient to preclude the reſpondent from the benefit of an anſwer, re-
" ſerved the *final* conſideration of the ſentence to the hearing of the cauſe, and
" conſequently left the appellants at liberty to avail themſelves of it in *every other*
" *way*, except by avoiding to anſwer."

The remainder of the argument in the printed caſe of the appellants being foreign to the ſubject of this argument, is therefore not fit to be introduced here.

courts to enquire into the legality of marriage as an incident to the trial of polygamy, in the ſame way as they before exerciſed it incidentally in civil actions, and that they ſhould ſhew the ſame deference to ſentences of courts having the direct juriſdiction. The exception in the act of James, which provides, that the act ſhall not extend to any perſon divorced at the time of the ſecond marriage by any ſentence of an eccleſiaſtical court, or to any perſon whoſe *former* marriage ſhould be declared void by the ſentence of ſuch a court, ſtrongly countenances this idea. See 1 Jam. 1. c. 11. ſ. 3. However, ſhould it be thought proper to controvert the point of concluſion, the operation of the act, in creating a temporal juriſdiction for the trial of polygamy, ſeems to me to leave greater ſcope for argument againſt the concluſive quality of the ſentence, than any other topick I am aware of; more eſpecially as the ſtatute of James excepts ſentences of the ſpiritual court in words not ſufficiently large in letter to comprehend a ſentence in a ſuit of *jactitation*; the ſtatute mentioning only ſentences of divorce, and ſentences declaring a former marriage void.

The only other objection, which occurs to me, againſt the *operation* of the ſentence as concluſive, ariſes from ſome few caſes, which I obſerve to have been heretofore cited for that purpoſe; though I do not ſee that they in any degree apply.—One is the caſe of Hinks and Harris, in which a prohibition, to ſtay ſiuit in the eccleſiaſtical court againſt one for inceſt in marrying his firſt wife's ſiſter, was granted *quoad* annulling the marriage; becauſe the ſecond wife was dead, and there was iſſue of the marriage, and conſequently baſtardiſing the iſſue would have been contradicting a rule of our law, that a marriage *de facto* ſhall not be avoided after the death of either party. See Carth. 271. But this caſe only proves a right to controul the ſpiritual courts, where they proceed in oppoſition to the *common law* in a point in which it predominates over the law eccleſiaſtical.—Another caſe is Hiliard and Phaly, in which the then lord chief juſtice of the king's bench on an iſſue from chancery to try a marriage refuſed even to receive as evidence a ſentence againſt the ſuppoſed huſband for fornication with the ſuppoſed wife, and his payment of money in commutation for the penance enjoined. But this caſe is a ſingle one againſt all the other authorities, and is unſupported by any reaſoning; and the rejection of the evidence was greatly diſapproved of by the lord chancellor King, when the matter came before him again, though it is not mentioned whether he granted a new trial. See 8 Mod. 180.—As to Emmerton and Hide, which was before lord Holt, and is cited in Comberb. 72. and Skinn. 455. but moſt fully in 3 Mod. 164. it only proves, that in an eject-

ment

ment the temporal court may incidentally try the lawfulneſs of marriage, which is not denied.—The caſe of Pride and the Earl of Bath in 3 Lev. 410. is liable to the ſame obſervation.

II.

Not having any thing further to offer in reſpect to the concluſive operation of the ſentence in the caſe in queſtion, on the ſuppoſition that it was pronounced in a ſuit really adverſe, I ſhall now explain, why I think, that concluſion, if there was any, will take from the ſentence its whole effect, and leave the lady as unprotected from inquiry into the alledged marriage with the ſuppoſed firſt huſband, as if there had not been any ſentence. But this point will not require a long diſcuſſion; both the principle, and the authorities on which it depends, being reducible within a very narrow compaſs.

All muſt agree, that the law ought to diſcountenance fraud and deceit of every kind, and ſo far as it is practicable to diſappoint thoſe who practiſe them, of the propoſed fruits. But that kind of fraud, by which the courts of juſtice themſelves are made the inſtruments of injuſtice or of the evaſion of law, ought to be more particularly guarded againſt; becauſe under the colour of ſuch a ſanction, the deception is more likely to have the credit of a fair tranſaction, and conſequently more likely to produce pernicious effects; and ſhould it ever become a rule not to allow the averment of fraud and colluſion in procuring a judgment or ſentence by impoſition on a court of juſtice, or not to allow it in any other court than that in which the ſentence or judgment was pronounced, it would be an engagement to adopt a ſpecies of frauds, which, by rendering detection inacceſſible, or at leaſt except in one particular court could not fail either of producing its full effect, or of anſwering a preſent purpoſe.

In ſtating the authorities on this point of colluſion, I ſhall begin with thoſe which explain the practice of our temporal courts; and I ſhall next proceed to take ſome notice of the doctrine of the civil law and the practice of the courts of eccleſiaſtical juriſdictions.

Lord Coke in Fermor's caſe, which depended on the effect of a fine fraudulently levied by a tenant for years, gives this general rule. *The common law,* he ſays, *ſo abhors fraud and covin, that all acts, as well judicial as others, though of themſelves juſt and lawful, yet being mixed with fraud and deceit, are in judgment of law tortious and unlawful.* See 3 Co. 78. a. This principle may

may be illuſtrated by a variety of examples, many of which are mentioned by lord Coke.

In general, the ſale of goods in market, or by a tortious poſſeſſor, will be good againſt the true owner; but his right will not be affected if there is covin between the vender and vendee. Bro. Colluſion 4. 2 Inſt. 713. Cro. Eliz. 86.—If an eſtate is conveyed to the king, and he by letters patent grants it over, and there is a covin betwen the perſon granting to the king and the king's grantee to avoid the ſtatute of mortmain, the grant from the king is liable to be repealed. 3 Co. 78. b.—An aſſignment of dower by a diſſeiſor to a woman having good title to it, if it is done without covin between them is good, and will bind the diſſeiſee. But if the diſſeiſor comes to the eſtate by colluſion between him and the widow, the aſſignment may be avoided by the diſſeiſee, though there is a juſt title to dower, and though the aſſignment be indifferently made of an equal third part; for, as lord Coke expreſſes it, *the covin in this caſe ſhall ſuffocate the right that appertained to her, and ſo the wrongful manner ſhall avoid the matter that is lawful.* See Co. Litt. 35. a. 358. b.—If a huſband diſcontinues his wife's eſtate in land, and the diſcontinue is diſſeiſed, and the diſſeiſor makes a leaſe to the huſband and wife for life, this will be a remitter to the wife, unleſs the diſſeiſin was by their conſent and covin; but if it was, then ſhe is a diſſeiſereſs. This caſe of covin's preventing a remitter is given by Littleton; and lord Coke in his comment adds another caſe, in which the iſſue intail by covin may loſe the benefit of a remitter. Litt. ſect. 678. and Co. Lit. 357. a. b.

But theſe inſtances of covin and colluſion, not being of the judicial kind, do not come up to the preſent purpoſe. Thoſe, which I ſhall now give, will all have relation to the effect of colluſion on judgments.—If a woman, having title to dower by covin or colluſion between her and a ſtranger, procures him to diſſeiſe the terre-tenant, to the intent that ſhe may bring dower againſt the diſſeiſor, and ſhe afterwards recovers accordingly, the judgment is void and of no force againſt the diſſeiſee, notwithſtanding the juſtneſs of her title to dower; becauſe it was obtained by colluſion; and lord Coke, after putting this caſe of dower, extends the doctrine to colluſive recoveries in other real actions as well as in dower; and it is a common language in our antient books, that all, who recover land by covin, ſhall be in as diſſeiſors or treſpaſſors according to the nature of the actions in which they recover. See Fermor's caſe 3 Co. 78. a. Wimbiſh and Tail-

bois Plowd. 42. and Brook and Fitzherbert, tit. *colluſion.*—In Fermor's caſe, which was before all the judges, the point determined by them was, that if tenant for years or by copy of court roll makes a feoffment, and levies a fine with proclamations to the feoffee, and this is done by colluſion in order to deprive the lord of his inheritance, the fine is abſolutely void, and the lord's right remains unbarred notwithſtanding lapſe of the five years. The colluſion in Fermor's caſe appeared from the tenant's continuing in poſſeſſion and paying rent after the fine, and till expiration of the leaſe for years, when he claimed the inheritance, and ſet up the fine and the five years as a title.—In a MS. common place book in the Inner Temple, I meet with the following caſe of a judgment by one court adjudged to be void in another court on account of colluſion. Edward Barber and William Pullen were indicted at the ſeſſions for Wiltſhire, in 3 of Charles the firſt, before Lord Chief Juſtice Hyde, Sir Digby, Sir Lawrence Hyde, and other juſtices, for treſpaſs in taking the cattle of one Turner. On the trial it appeared, that they had taken the cattle under a *levari facias* on a judgment in the county court in an action of debt by Barber againſt Turner; but it being proved, that the action was a colluſion between Barber and Pullen, and that Pullen had appeared for Turner without any authority, the court was of opinion, that the judgment was a nullity; and the jury finding them guilty of the treſpaſs, they were fined 40l. a-piece and impriſoned for a month. This caſe is not in any printed book.—Farr's caſe in Kel. 43. and 1 Sid. 234. is a caſe in ſome reſpect ſimilar to that of Barber and Pullen; for Farr was found guilty of a burglary, though he entered under a writ of poſſeſſion on a judgment againſt the caſual ejector by default in an ejectment; it being proved, that he had obtained it by falſely ſwearing to the having given notice to the tenant in poſſeſſion, and that when he had entered he robbed the houſe of jewels and other valuable property. It is well obſerved by Lord Chief Juſtice Kelynge, that Farr's making uſe of the law to get the poſſeſſion was ſo far from excuſing him, that it heightened his offence.—But the moſt frequent inſtances of the inefficacy of colluſive judgments relate to executors and adminiſtrators. Even in the time of Lord Coke it was a thing of courſe to reply to a judgment ſet up by an executor, that it was obtained by fraud or covin. In Turner's caſe, 8 Co. 132. which was debt againſt one as adminiſtrator, the defendant pleaded ſeveral judgments; and, as to one, plaintiff replied, that it was by fraud and covin, on which iſſue was joined; and as to the others he replied, that they were ſatisfied and kept on foot to defraud; to which

defendant demurred. Now, in this caſe there was not a doubt entertained of the nullity of a colluſive judgment; but the point of law which aroſe was, whether a judgment, allowed to be originally good, could become covinous by a ſubſequent act; and the court adjudged that it might. Beſides Turner's caſe, the printed reports contain many inſtances of replications of fraud and covin to judgments pleaded by executors and adminiſtrators. In the caſe of Veale and Gateſden, W. Jo. 91. the judges incidentally obſerve, that ſuch replications may be made; nor do I find the right to reply once controverted in any book; the queſtions debated having ever been merely as to the manner of replying *per fraudem* to judgments, particularly whether ſeveral judgments ſhould be diſtinctly replied to or might be taken together; or as to the manner of traverſing a replication, that a ſatisfied judgment was fraudulently kept on foot, that is, whether the ſatisfaction or the fraud ſhould be traverſed. See W. Jo. 91. Latch. 111. 1 Sand. 336. 2 Saund. 48. Cart. 221. 1 Mod. 33. 2 Mod. 36. 1 Show. 289. 1 Freem. 28. See alſo Meriel Threſham's caſe, 9 Co. 108. in which one point was, whether replying that a ſatisfied recogniſance was kept on foot by covin was good, only one perſon being mentioned, and covin in ſtrictneſs importing fraud by two at leaſt.

When I conſider theſe authorities, they appear to me ſo forcible, as not to leave a doubt as to the right to plead or enter into the proof of colluſion in obtaining the ſentence in queſtion, or as to the effect of the colluſion when proved. All the caſes I have ſelected are unconnected with any act of parliament; for I have avoided mentioning inſtances, in which the right of avoiding a judgment for colluſion in any degree depends on aid from them. It ſhould alſo be attended to, that none of the caſes and authorities in the leaſt hint at any diſtinction as to *the kind of court by which the judgment is pronounced, or the court in which the fraud or colluſion is averred*; the rule appearing to be quite *general*, and to apply to *all judicial* acts whatever, and to make all equally void when infected with colluſion. Nor can I conceive any reaſon for making a difference in this reſpect between the judgments of the temporal courts and the ſentences of courts eccleſiaſtical. Lord Coke in Fermor's caſe before-mentioned, after citing an abundance of inſtances to prove the opinion that all judicial as well as other acts when mixed with fraud or covin are nullities, repreſents the judges as ſumming up their arguments in theſe forcible words. *Hereupon*, as he writes, *it was concluded, that if recovery in dower or other real action, if remitter*

ter to a feme covert or an infant of warranty, if ſale in market overt, if letters patent of the king, of preſentation and adminiſtration; that is to ſay, if all acts temporal and ſpiritual ſhall be avoided by covin, for the ſame reaſon a fine in the principal caſe, levied by fraud and covin, ſhall not bind. See 3 Co. 78. b. So here I ſay, if the judgments of all our temporal courts, even the king's courts of record in Weſtminſter-Hall, are univerſally liable to the averment of fraud and colluſion; and, if, being infected with either, ſuch judgments are nullities; why ſhould not the ſentences of courts eccleſiaſtical be equally open to the ſame averment; and why, if proved, ſhould not the effect and conſequence be the ſame? The words I have cited from Lord Coke he reports as the opinion of the judges in the Exchequer chamber; and therefore on their authority, as well as on the reaſon of the thing, I am intitled to think, that in this reſpect no diſtinction ought to be made between the two juriſdictions; and that all judicial acts, whether temporal or eccleſiaſtical, if procured by fraud or colluſion, ought to be void *.

But it is not requiſite wholly to reſt this doctrine of colluſion on the general reaſoning or the rules and practice of our temporal courts; for authorities from the writings of the civilians and canoniſts are not wanting.

Scaccia, one of the few who have publiſhed ſeparate treatiſes on the effect of ſentences, is very explicit on the ſubject of colluſion. In his famous book *de ſententiâ et re judicatâ*, which came out at Venice in 1629, after ſtating the general rule, that *res inter alios acta aliis nec prodeſt nec nocet*, proceeds to explain the exceptions to this rule. One of them, he writes, is, *quando ſententia eſt lata cum legitimo contradictore, id eſt, cum eo cujus principaliter intereſt, et à quo alii jus habent conſecutivum; quia tunc illa ſententia facit jus quoad omnes, etiam non intervenientes et non citatos.* See page 349. The author having enlarged upon this exception, and pointed out who ought to be deemed *legitimi contradictores*, and particularly how far the exception applies to ſentences for or againſt marriage, proceeds next in the formal manner of the law-writers of that age, to qualify the exception by limitations; and amongſt theſe we find colluſion; for he ſays,

* See accordingly the caſe of Roach and Garvan, 1 Veſ. 157. where Lord Chancellor Hardwicke ſays, that colluſion will overturn any eccleſiaſtical ſentence. See alſo 1 Veſ. 287.

that the exception will not hold, *quando ſententia eſſet lata per colluſionem; quia tunc aliis non noceret.* He adds, *et dicitur ſeu præſumitur lata per colluſionem, quando victus non adhibuit omnem diligentiam, ſed detegitur ejus culpa et negligentia; putà quando non appellat a ſententiâ, ſed illæ acquieſcit, et multo magis ſi addit confeſſionem: fraus enim et dolus nemini patrocinari debent in alterius præjudicium; et ideo ſententia lata per colluſionem habetur pro non ſententiâ, ſeu aliis non nocet, quamvis ſublatâ colluſione noceret.* See page 355. To warrant this doctrine of the nullity of a colluſive ſentence, the author cites a great variety of writers as well on the canon as the civil law.

Heraldus, another profeſſed writer on the force of ſentences, holds the ſame language in reſpect to colluſion, though his words are not quite ſo full and ſtrong as thoſe of Scaccia. After ſhewing that in general a ſentence againſt a *hæres ſcriptus*, he being of the number of the *legitimi contradictores*, would bind a legatary, Heraldus qualifies the generality of the rule by adding, that the legatary will not be affected, if the *hæres ſcriptus* either is inactive or acts colluſively. The words of Heraldus are, *Sanè ſi contra hæredem ſcriptum non agente, vel luſorie agentem pronuntiatum ſit, nihil hoc nocet legatariis, ut ait Ulp. l. ſi ſervus* 50. *ſ.* 1. *de leg.* 1. *quod eſt certi et indubitati juris.* Vid. *Herald. de rerum judicatarum auctoritate lib.* 1. *cap.* 2. *ſect.* 1.

As to the opinions and practice of our eccleſiaſtical courts on the ſubject of colluſion in obtaining ſentences, the want of any publiſhed reports of their doctrine renders it difficult to adduce precedents. But there is a caſe in one of our own books of reports, which ſeems to prove, that the practice of the courts eccleſiaſtical is the ſame as that of the temporal courts. The caſe is in Moore; and being ſhort, I will give it tranſlated from his own words, which are in Law-French.

Lloyd and Maddox, Eaſter 14 *Jam. in the king's-bench.* ——*One ſues an executor in the court chriſtian for a legacy, who pleads a recovery in debt againſt him at common law, and that* ultra *that which would be neceſſary to ſatisfy this debt he had not aſſets; to which the plaintiff in the eccleſiaſtical court pleads, that the recovery was by covin, and that the plaintiff offers to diſcharge the judgment and the defendant will not. And on this the queſtion was, if prohibition was awardable,*

or

or not; and reſolved, that it was not, but that the covin was aptly examinable in the court chriſtian; becauſe the legatee could not ſue at common law for the legacy. See Moore 917.

This caſe is remarkable, for it appears to prove the practice of both juriſdictions at the ſame time.—The eccleſiaſtical court receives the allegation of covin againſt the judgment as a proper ſubject of inquiry; and conſequently as one which was relevant, and if proved would make the judgment a nullity. The party, who pleaded the judgment, was diſſatisfied; and to avoid inquiry into the covin flies to the temporal court for a prohibition. But the temporal court, adverting to its own rule of treating colluſive judgments as nullities, approves of the proceedings of the eccleſiaſtical juriſdiction; and though fraud and colluſion are not in general examinable before the latter, permits this ſpecies of fraud to be ſo, as an eſſential incident to an effectual exerciſe of the ſpiritual juriſdiction over legacies.

Upon the whole, when I take into conſideration all the numerous precedents furniſhed by our own law-books; when I add to them the opinions of the writers on the canon and the civil law; and further, when I reflect on the reaſonableneſs of allowing colluſion to be averred againſt a judgment or ſentence, whatever the juriſdiction in which it was given or is pleaded, and on the miſchiefs which might follow, if any judgment or ſentence ſhould not be open to ſuch an averment; my opinion is ſo decided, that I almoſt doubt, whether the counſel for the lady will oppoſe the proſecutor on this ground. I rather ſuſpect, that the conteſt will be, what is the kind of evidence proper to the proof of colluſion; and that what the counſel for the proſecutor may deem evidence of colluſion, thoſe for the party proſecuted will call mere evidence of the marriage. However, ſhould the evidence of colluſion be controverted on the part of the lady, the chief ſource of argument for her, I conceive, muſt be the various ſtatutory proviſions againſt fraud and colluſion in particular caſes. But the obvious anſwer to any reaſoning from them is, that the ſentences, on which I rely, are independant of any legiſlative aid. The caſe of Prudam and Phillips, which was once thought to be an authority againſt giving evidence of colluſion againſt a ſentence of the ſpiritual court, appears by Mr. Ford's note to be an authority the other way, the evidence being refuſed merely becauſe Mrs. Phillips, who offered it, was herſelf one of the colluding parties; and it ſeemed to be agreed both by court and counſel, that it would otherwiſe have been admiſſible.

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As to Hatfield and Hatfield, I apprehend that the point of colluſion was not before the lords. However, as in the reaſons to the appellant's caſe the ſentence is called colluſive, it will be proper to examine the printed caſe accurately *.

*It is fit to apprize the reader, that the two queſtions which are the ſubject of the preceding argument, when the caſe came on for trial, were referred to the judges; and that their anſwer to the firſt queſtion was contrary to the opinion, which previouſly to the trial had been given by the editor.

The queſtions to the judges were,

1. Whether a ſentence of the ſpiritual court againſt a marriage in a ſuit for jactitation is concluſive evidence, ſo as to ſtop the counſel for the crown from proving the ſaid marriage in an indictment for polygamy?

2. Whether, admitting ſuch ſentence to be concluſive upon ſuch indictment, the counſel for the crown may be admitted to avoid the effect of ſuch ſentence, by proving the ſame to have been obtained by fraud or colluſion?

The opinion of the judges on theſe queſtions was unanimous. To the former they anſwered in the negative, to the latter in the affirmative. It is not thought neceſſary to give the words of their anſwer here, becauſe they are a mere repetition of the queſtions propoſed. The reaſons of this opinion, as delivered by the late lord Walſingham, then chief juſtice of the common pleas, were thought ſo important, that the lords requeſted to have a copy of his argument; which was accordingly given, and is now in print. See State Trials, vol. xi. p. 261.—EDITOR.

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AN

ARGUMENT

IN THE

EXCHEQUER CHAMBER

ON

GIVING JUDGMENT in the CASE

OF

PERRIN and Another againſt BLAKE,

By the Hon. Mr. Juſtice BLACKSTONE.

[The following argument is printed from the original manuſcript in the hand-writing of the great modern commentator on the law of England, whoſe name it bears.

The copy-right was purchaſed by the editor from one, who derived his title to it from the executor of Sir William Blackſtone. The caſe, to which it relates, is ſhortly given in the judge's printed reports. But this argument is there omitted; which, as the editor conjectures, was owing to the circumſtance of its being written on a ſeparate paper inſtead of being contained in the judge's note-books.]

AN

ARGUMENT,*

By Mr. JUSTICE BLACKSTONE,

Upon delivering Judgment in the Exchequer Chamber,

In PERRIN and Another *v.* BLAKE,

Wednesday 29 Jan. 1772. Hilary 13 G. III.

UPON the fulleſt conſideration which I have been able to give to this caſe, I am of opinion, that the judgment of the court of king's-bench is erroneous and ought to be reverſed.

I conceive, that the great and fundamental maxim, upon which the conſtruction of every deviſe muſt depend, is, "that "the intention of the teſtator ſhall be fully and punctually ob- "ſerved,

* The caſe, to which this argument by the late Mr. Juſtice Blackſtone, belongs, is remarkable for having attracted the attention of Weſtminſter-hall for many years. In ſeveral printed books of deſerved authority, there is an account of the caſe †. Mr. Juſtice Blackſtone, Sir James Burrow, and Mr. Fearne, all ſtate as much of the will, upon the conſtruction of which the caſe depended, as is neceſſary for underſtanding the force of any of the arguments. Mr. Douglas has in his Reports added ſome particulars, relative to the manner in which the caſe came before the king's-bench, and its ſubſequent progreſs. But one full and connected account of the caſe, repreſenting whence the litigation ſprung, with the particulars of its long progreſs, firſt through the courts of Jamaica and the privy council, and afterwards through Weſtminſter-hall to the houſe of lords, has not yet appeared in print. It therefore occurred to the editor, that his endeavours, to collect and digeſt the neceſſary materials for that purpoſe, might enable him to perform a ſervice both uſeful and agreeable to profeſſional readers.

The ſubject of the caſe from the beginning was the validity of a jointure of 1000*l.* a year claimed by a Mrs. Williams out of a Jamaica eſtate ſaid to be about three times that yearly value. Her claim was immediately founded on a ſettlement, made upon her after marriage, but in purſuance of articles before, by her huſband John Williams, Eſq; The queſtion was on his right to make ſuch a ſettlement; and this depended on the conſtruction of a deviſe to him in the will of his father William Williams, Eſq; If the will paſſed an eſtate tail to John Williams, he having done the acts requiſite by the laws of Jamaica for barring intails, the jointure of the widow was effectual. If the will paſſed only an eſtate for life, the jointure was bad. Whether alſo the former or latter of theſe conſtructions ought to prevail, was chiefly to be decided by a conſideration of the rule of law, thus expreſſed by lord Coke in his report of Shelley's caſe; namely, "that when the anceſtor by "any gift or conveyance takes an eſtate of freehold, and in the ſame gift or con- "veyance an eſtate is limited either mediately or immediately to his heirs in fee "or

† 1 Black. 672. 4 Burr. 2579. Fearne on Conting. Rem. 3d. Ed. 110. Dougl. Rep. B. R. 529. in a note, and Mr. Fearne's copies of opinions of counſel in Perrin v. Blake, printed in 1780.

" ſerved, *ſo far* as the ſame is conſiſtent with the eſtabliſhed " rule of law; *and no farther.*"—If it did not go *ſo far*, it would be an infringement of that liberty of diſpoſing of a man's own property, which is the moſt powerful incentive to honeſt induſtry, and

" or in tail, always in ſuch caſes *heirs* are words of *limitation* of the eſtate, and " not words of *purchaſe.*" This rule being applied to the will in queſtion, the teſtator's ſon was tenant in tail: not being applied, he was tenant for life only. Hence at length the caſe grew into ſuch general importance; for when the will in queſtion became thoroughly conſidered, there appeared ſuch a ſtrong connection between the particular caſe and the rule of law before ſtated, that the long conteſted general point, how far that rule ſhould govern laſt wills, ſeemed in the idea of almoſt the whole profeſſion of the law to wait for a final ſettlement from the fate of this particular caſe. This will account for the anxiety with which profeſſional men for a courſe of years watched its progreſs, as alſo for the peculiar attention which is ſtill ſhewn to it.

So much is offered to the reader by way of introduction to the caſe.—What follows is a particular relation of the facts of the caſe, with an account of the various ſuits carried on to obtain a final deciſion, from their firſt commencement in the ſupreme court of Jamaica in 1746, to their final termination by an agreement of the parties in 1777, when the controverſy had reached its laſt ſtage, and was ready for hearing before the houſe of lords.

William Williams of Jamaica, Eſq; being ſeiſed in fee of a plantation in that iſland, and having one ſon and three daughters, duly executed his will bearing date 13th of March 1722.

In this will, after legacies of 2000l. a piece of Jamaica currency to the three daughters, whoſe names were Bonella, Hannah, and Anna, the teſtator proceeds in the following words:

" And ſhould my wife be enſeint with child at any time hereafter, and it be a " female, I give and bequeath unto her the ſum of 2000l. current money of this iſ- " land, and to be paid her when ſhe attains the age of twenty-one years or day of " marriage, which ſhall firſt happen, and to be generouſly educated and main- " tained out of my eſtate till her portion becomes payable without any deduction " of the ſame or any part thereof. And if it be a male, I give and bequeath my " eſtate, both real and perſonal, equally to be divided between the ſaid infant and " my ſon John Williams, when the ſaid infant ſhall attain to the age of twenty- " one. Item, and it is my intent and meaning, that none of my children ſhould " ſell and diſpoſe of my eſtate for longer time than his life; and to that intent I " give, deviſe and bequeath all the reſt and reſidue of my eſtate *to my ſon John Wil-* " *liams and the ſaid infant for and during the term of their natural lives, the remainder to* " *my brother-in-law Iſaac Gale and his heirs for and during the natural lives of my ſaid* " *ſons John Williams and the ſaid infant; the remainder to the heirs of the bodies of my* " *ſaid ſons John Williams and the ſaid infant lawfully begotten or to be begotten*; the re- " mainder to my daughters for and during the term of their natural lives equally " to be divided between them; the remainder to my ſaid brother-in-law Iſaac " Gale and his heirs during the natural lives of my ſaid daughters reſpectively; " the remainder to the heirs of the bodies of my ſaid daughters equally to be di- " vided between them. And I do declare it to be my will and pleaſure, that the " ſhare and part of any of my ſaid daughters that ſhall happen to die ſhall imme- " diately veſt in the heirs of her body in manner aforeſaid. Item, it is my will " and deſire, that all the produce of my eſtates, after the payment of my debts, " except what ſhall be thought needful by my executors for the ſupport and ex- " pences of my family and eſtates, be duly ſhipped upon inſurance to the king- " dom of Great-Britain or bills of exchange for the ſame to Humphrey South and " company or ſome other ſubſtantial perſon or perſons, to be put at intereſt into " the bank of England; and likewiſe to get in all my monies due on mortgages, bonds

and is therefore eſſential to a free and commercial country:—if it went *farther*, every man would make a law for himſelf; the metes and boundaries of property would be vague and indeterminate, which muſt end in its total inſecurity. But

" bonds, bills, and any otherwiſe as they ſhall become due, to be remitted in " goods or bills as aforeſaid. And I give to my executors full power and lawful " authority to authorize the ſaid South or ſome other ſubſtantial knowing man to " lay out the ſaid monies in good landed eſtates. And laſtly, I do hereby nomi- " nate and appoint my loving wife, during her widowhood, executrix and guar- " dian, together with my loving friends Iſaac Gale, Jonathan Gale, Eſquire, Bar- " nart Lewis Eſquires, John Gale and Thomas Woolley ſenior, executors and " guardians to my children during their minorities."

Iſaac Gale, the deviſee in truſt in this will, died before the teſtator.

On the 4th of February 1723, the teſtator died, leaving iſſue John Williams his only ſon and heir, and the three daughters named in the will.—The teſtators's wife was not enceint at his death or at any time after, and died 1ſt of March 1723.

In February 1723, the teſtator's ſon John Williams came of age; and conceiving himſelf to be ſeiſed in fee tail under the will of his father, he immediately made ſuch conveyance of the deviſed plantation in Jamaica, as by the law of that iſland is equivalent to a common recovery here.

In March following John Williams executed a ſettlement in purſuance of marriage articles made whilſt he was under age: and by this ſettlement the plantation entailed by his father's will was conveyed to truſtees and their heirs to the uſes following; namely to the uſe of John Williams for life; remainder to the uſe of truſtees during his life to preſerve contingent remainders; remainder to the uſe and intent that Sarah his wife, if ſhe ſurvived him, might receive out of the premiſes, during her life, a clear yearly rent charge of 1000l Britiſh money, payable at the Royal Exchange London quarterly, with powers of diſtreſs and entry; and ſubject to this rent-charge to the uſe of John Sharpe, William Perrin, and Thomas Vaughan, their executors adminiſtrators and aſſigns for 400 years, for ſecuring the rent-charge; remainder to the firſt and other ſons of John Williams by the ſaid Sarah his wife, ſucceſſively in tail male: remainder to John Williams in fee.

On the 31ſt of December 1744, John Williams died without iſſue, leaving Sarah his widow, and his two ſiſters, Bonella the wife of Norwood Witter and Hannah the wife of Benjamin Blake, his coheirs, Anna the other ſiſter having died unmarried in his life-time.

In 1745, immediately after the death of John Williams, the huſbands of his two ſurviving ſiſters and coheirs in their right entered into the plantation ſo deviſed and ſettled and became ſeiſed. Mr. Blake and his wife brought an action againſt Mr. Norwood Witter and his wife in the ſuperior courts of Judicature in Jamaica for a partition, and obtained judgment for that purpoſe; which judgment was afterwards executed by an actual partition under a writ to the provoſt-marſhal.

After this partition the wife of Witter died, leaving William Witter her ſon and heir; and Benjamin Blake alſo died, leaving the ſaid Hannah his widow.

Both William Witter and Hannah Blake controverted the validity of the jointure of 1000l. a year to Mrs. Williams the widow, on the ground, that her deceaſed huſband John Williams was a mere tenant for life under the will of his father, and therefore could not bar the intail thereby created.

To try this point, which depended on the queſtion, how the remainder in the will of William Williams to the heirs of the bodies of his ſons John Williams and the unborn infant therein referred to ought to be conſtrued, Perrin and Vaughan, the ſurviving truſtees of the term of 400 years for ſecuring Mrs. Williams's jointure, brought two ejectments in the ſupreme court of judicature at St. Jago in Jamaica. One was brought againſt William Witter, for that part of the plantation in his poſſeſſion under the partition; and the other againſt Hannah Blake, for the part allotted to her. In both theſe ejectments the judgment of the ſupreme court was againſt Mrs. Williams's truſtees. Writs of error were brought on both judgments in

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But there is, I will acknowledge, a diſtinction to be made, though too often confounded or forgotten, in what is meant by thoſe *rules of law*, which muſt co-operate with the intention of the teſtator, in order to effectuate his deviſe. Some

the court of appeals and errors in Jamaica, which conſiſts of the governor and council. But the fate of the two writs of error there was different; the judgment in the ejectment againſt Mr. Blake being reverſed; but the other againſt Mr. Witter, which was not heard till ſeveral years afterwards, being affirmed.

On both Judgments in the court of appeals and errors in Jamaica, there was an appeal to the king in council.

What was done by the privy council on the appeal againſt Mr. Witter, I am not informed of.

But, in reſpect to the appeal to the privy council brought by Mr. Perrin and his co-truſtee againſt Mrs. Blake, it appears to have taken the following courſe *.

The lords of the privy council, conceiving that the record brought before them was for want of a ſpecial verdict too imperfect, therefore reverſed the judgment of the court of appeals in Jamaica, but with a direction not to prejudice the merits, and a recommendation of a ſpecial verdict on a new ejectment to be brought by Mrs. Williams's truſtees. Accordingly a new ejectment was proſecuted by Mr. Perrin and his co-truſtee Mr. Vaughan; and a ſpecial verdict being found, and both the ſupreme court in Jamaica and the court of appeals or errors there having given judgment for Mrs. Blake the defendant, the plaintiffs appealed to the king in council. In July 1765, the cauſe came on to a hearing before the lords of the committee of the privy-council. But lord Mansfield, being the only law lord who then attended the council, did not chuſe, that a queſtion, of ſo general a tendency in reſpect to all the landed property in England, ſhould be decided on his ſingle opinion; and therefore it was agreed, that the appeal ſhould be adjourned, till a ſolemn adjudication of the point ariſing on the will of William Williams could be obtained in Weſtminſter-hall. For this purpoſe a caſe was at firſt prepared for the opinion of the court of king's-bench, and ſigned by the counſel on each ſide. But ſuch a reference from the cockpit to one of the courts of Weſtminſter being a novelty, it was at length agreed to take the opinion of the king's bench in a feigned action of treſpaſs, in ſuch a way, as to give the benefit of a writ of error to the exchequer chamber, and from thence to the houſe of lords. Accordingly a record was framed for the king's bench to this effect.

Meſſieurs Perrin and Vaughan, the ſurviving truſtees of the term of four hundred years for ſecuring Mrs. Williams's jointure, brought treſpaſs againſt Mrs. Hannah Blake for forcibly entering upon the plantation in Jamaica, with a *videlicet* to lay the action in a pariſh in Middleſex. To the declaration on this treſpaſs, the defendant pleaded as to the force not guilty; and as to the reſidue of the treſpaſs, that William Williams being ſeiſed in fee deviſed the premiſes to his ſon John Williams for his life, remainder to the defendants and the two other daughters of teſtator in fee; that the teſtator died ſeiſed 4 Feb. 1723; that the two other daughters and the ſon John died; and that on John's death defendant entered and was ſeiſed. To this plea the plaintiffs put in a replication, ſtating the will of William Williams at length and his death; that Iſaac Gale mentioned in the will died before teſtator; and that afterwards John Williams ſuffered a common recovery, to the uſe of himſelf in fee, which was done; inſtead of ſtating the real fact of the conveyance operating as a bar of intails according to the law of Jamaica, in order to have the point determined, as if the eſtate actually was ſituate in England; and alſo that John Williams ſo becoming ſeiſed in fee demiſed to the plaintiffs for a thouſand years, who entering under this term were treſpaſſed upon by defendant, as in the declaration. To this replication the defendant demurred; and plaintiffs joining in demurrer, the caſe was thus brought before the court of king's bench for judgment.

Upon

* Dougl. Rep. B. R. 329. in a note.

Some of these rules are of an essential, permanent, and substantial kind; and may justly be considered as the indelible landmarks of property, irrevocably established by the well-weighed policy of the law, which have stood the test of ages, and which cannot

Upon these pleadings, in various parts of which some of the real facts were varied and others omitted, in order I presume to accommodate the record to the shortest mode of bringing forward the true point in issue, the case came on to a hearing in the king's bench, in Easter term 9 G. 3,* when Mr. Serjeant Walker argued for the plaintiffs, and Mr. serjeant Glyn for the defendant. It was argued a second time in Trinity term following, by Mr. serjeant Burland for the former, and by Mr. Dunning then sollicitor-general for the latter. The judgment of the court was given in Trinity term 10 G. 3, for the defendant Mrs. Blake; lord Mansfield chief justice and Aston and Willes justices holding, that John Williams took merely an estate for life; but Yates justice being of opinion, that the remainder to the heirs of the body of John Williams the tenant for life were words of limitation, and passed an estate tail to him.

A writ of error was brought upon this judgment in the exchequer chamber, where it was argued several times, of which the last was in May 1771. After a pause of above seven months, the judges of the exchequer chamber delivered their opinion *seriatim* on the 29th of January 1772; and then it was, that Mr. justice Blackstone delivered the following argument,

The result was a judgment of reversal, by the opinions of seven judges against one; lord chief baron Parker, Mr. baron Adams, Mr. justice Gould, Mr. baron Perrott, and the justices Blackstone and Nares, being all against the judgment of the king's bench, and lord chief justice De Grey the only judge for it.

Upon the whole therefore eight judges were for an estate tail in John Williams, and four for an estate for life.

A writ of error was next brought in parliament to carry the point for a final decision by the house of lords. This writ of error was kept depending for several years without either party's chusing to force on a hearing. But at length a compromise took place between the parties; and on a petition from them to the house of lords representing the compromise, that house on the 7th of May 1777 ordered a *non-pros* to be entered on the writ of error †; and that the record should be remitted to the *king's bench* for executing *the judgment of that court, as if no writ of error had been brought into that house*.

Thus this famous case of Perrin and Blake at last ended by a compromise, after a litigation of above thirty years; the trustees for the widow of John Williams, the validity of whose jointure of 1000l. a year was from the beginning the subject in dispute, appearing by the precedent state of the case to have commenced their first ejectment to establish the jointure as long ago as the year 1746.

It seems particular, that under any circumstances a lady should not be able to know, whether her jointure was good or not without waiting for upwards of thirty years; and that at last the business should have no decision, but terminate in a compromise between the contending parties.

It was certainly a misfortune to the lady, whose interests were at stake, that the case took such a turn, that her jointure could not be decided upon, without its being understood as a final precedent for explaining a rule of law of general importance: one, about which there has lately prevailed amongst professional persons an uncommon diversity of sentiments, and by the mode of applying which the titles to all the real property of the country are ever liable to be most essentially affected.

——EDITOR.

* 1 Blackst. Rep. 672. 4 Burr. 2579.

† This with what follows seems to make it doubtful, whether the judgment of the *king's bench* or of the *exchequer chamber* was in point of form to be executed.

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be exceeded or tranſgreſſed by any intention of the teſtator, be it ever ſo clear and manifeſt. Such as, that every tenant in fee-ſimple or fee-tail ſhall have the power of alienating his eſtate, by the ſeveral modes adapted to their reſpective intereſts;—that no diſpoſition ſhall be allowed, which in its conſequence tends to a perpetuity;—that lands ſhall deſcend to the eldeſt ſon or brother *alone*, or to *all* the daughters or ſiſters in partnerſhip. Theſe, and a multitude of other fundamental rules of property in this kingdom, are founded on the great principles of public convenience or neceſſity, and therefore cannot be ſhaken or diſturbed by any whim or caprice of a teſtator, however fully or emphatically expreſſed. A condition not to alienate is void, when annexed to a deviſe in fee, or in tail:—an executory deviſe which tends to a perpetuity, by depending on ſo diſtant a contingency as the general failure of iſſue, is totally null from the beginning:—and no man would be ſuffered to direct, that his lands ſhall be deſcendible for the future to *all* his male iſſue, or only to the *eldeſt* of his female.

But there are alſo certain other rules of a more arbitrary, technical, and artificial kind; which are not ſo ſacred as theſe, being founded upon no *great principles* of legiſlation or national policy. Some of theſe are only rules of interpretation or evidence, to aſcertain the intention of parties, by annexing particular ideas of property to particular modes of expreſſion: ſo that when a teſtator makes uſe of any of thoſe technical modes of expreſſion, it is evidence *prima facie*, that he means to expreſs the ſelf-ſame thing, which the law expreſſes by the ſelf-ſame form of words.—Thus, if a man deviſes his land, being *freehold*, to another generally, without ſpecifying the duration of his eſtate, the deviſee ſhall be only tenant for life:—if he deviſes in like manner a *chattel* intereſt, the deviſee ſhall have the total property:—a deviſe to a man *and his heirs* ſhall give him the full and abſolute dominion; to a man *and the heirs of his body*, ſhall give him a more limited inheritance.

Laſtly, there are ſome rules, which are not to be reckoned among the great fundamental principles of juridical policy, but are mere maxims of poſitive law deduced by legal reaſoning from ſome or other of theſe great fundamental principles. Such as, that a man cannot raiſe a fee-ſimple to his own right heirs, by the *name* of *heirs*, as a *purchaſe*; or, to bring it home to the caſe now before the court, that a deviſe of lands to a man for his life, and afterwards in any part of the ſame will a deviſe of the ſame lands to the heirs of his body, ſhall conſtitute an eſtate tail in the firſt deviſee for life.

But

But ſome of theſe rules, of the ſecond and third claſs, are rules of a more flexible nature than thoſe of the preceding kind, and admit of many exceptions; whereas thoſe admit of none. For, if the intention of the teſtator be *clearly* and *manifeſtly* contrary to the legal import of the words, which he has thus haſtily and unadviſedly made uſe of, the technical rule of law ſhall give way to this *plain* intention of the teſtator. This has been clear law for four centuries at leaſt, if not longer. It is ſaid by the judges in 9 Hen. 6, fol. 24, that a deviſe is *marvellous* in its operations; and many inſtances are given, where it may countervail the ordinary rules of law. The like doctrine is to be met with in every reporter ſince; and is the ſame that obtained in equity for the conſtruction of uſes before the ſtatute. In the caſe of uſes (ſays lord Bacon of Uſes 308, 8vo edit.) the chancellor will conſult with the rules of law, where the *intention* of the parties does not *ſpecially* appear. But then, this intention of the teſtator, which is to ride over and controul the legal operation of his own words, muſt be "*manifeſt* and *certain* and not "*obſcure* or *doubtful*," as was reſolved by all the judges of England in *Wild's caſe*, 6 Rep. 16. Or, according to the emphatical words of lord Hobart, 33, "the intent muſt *not* be *conjectural*, "but by *declaration plain*." Which words of lord Hobart, as they are adopted and conſtrued by lord Hardwicke, in *Garth* and *Baldwyne*, 2 Vez. 646, muſt mean, "*plain expreſſion* or "*neceſſary implication* of his intent. But if that intent be uncer- "tain, if it be in *æquilibrio*, or even in ſuſpence or doubt, then "(he afterwards adds) the legal operation of the words *muſt* take "effect." And moſt certainly his lordſhip has laid down and explained the rule with that ſagacity and caution, which ſo eminently diſtinguiſhed his deciſions. For as, on the one hand, it would be very unreaſonable to *controul* the *plain intent* of a teſtator by technical rules, which were principally contrived to *aſcertain* it; ſo, on the other hand, where the intent is obſcure or even doubtful, and liable to a variety of conjectures, it is the beſt and the ſafeſt way to adhere to thoſe criterions, which the wiſdom of the law has eſtabliſhed for ages together, for the certainty and quiet of property. Every teſtator, when he uſes the legal idiom, ſhall be ſuppoſed to uſe it in its legal meaning, unleſs he *very plainly* declares that he means to uſe it otherwiſe. And if the contrary doctrine ſhould prevail; if courts either of law or equity (in both of which the rules of interpretation muſt be always the ſame) if theſe or either of them ſhould indulge an unlimited latitude of forming *conjectures* upon wills, inſtead of attending to their *grammatical* or *legal* conſtruction, the conſequence muſt be endleſs litigation. Every title to an eſtate,

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that depends upon a will, muſt be brought into Weſtminſter Hall: for if once we depart from the eſtabliſhed rules of interpretation, without a *moral certainty* that the meaning of the teſtator requires it, no interpretation can be ſafe till it has received the ſanction of a court of juſtice. For how can a client or a purchaſor be aſſured, that the conjectures of the moſt able counſel, or the moſt experienced conveyancer, will be in all points the ſame as the conjectures of the judges or the chancellor? A civilian of ſome eminence, Mantica, has written a learned treatiſe on their law, which he has entitled, *de conjecturis ultimarum voluntatum*; but I hope never to ſee ſuch a title in the law of England. For, ſhould ſuch a doctrine ever prevail in this country, it were better that the ſtatute of wills ſhould be totally repealed, than be made the inſtrument of introducing a vague diſcretionary law, formed upon the occaſion from the circumſtances of every caſe; *to* which no precedent can be applied, and *from* which no rule can be deduced.

The principles being thus cleared, upon which I have endeavoured to found my preſent opinion, I ſhall now proceed to ſtate, what is the legal and technical import of the words made uſe of in this deviſe;—and will then conſider whether there is any *plain* and *manifeſt* intention of the teſtator, to be gathered from any part of his will, which may controul and overrule the legal operation of the words; and at the ſame time be conſiſtent with the fundamental and immutable rules of law.

The words which are material to be conſidered, in the event that has happened (when ſtript of all embarraſſment from the contingency, which never aroſe, of the birth of a poſthumous ſon†) are the following:—"*Item*, and it is my *intent* and *meaning*, that none of my children ſhould *ſell* and *diſpoſe of* my eſtate for *longer time than his life*: and *to that intent* I give deviſe and bequeath all the reſt and reſidue of my eſtate to my ſon John Williams for and during *the term of his natural life*; the remainder to my brother in-law Iſaac Gale and his heirs, for and during the natural life of my ſaid ſon John Williams;

† Mixing the deviſe to the unborn infant, with that to the ſon living, was however taken advantage of for the jointreſs when the will was before the privy-council, as appears by the two firſt reaſons in the printed caſe on her behalf ſubſcribed by Mr. Yorke and Mr. De Grey. For in them it was contended,—firſt, that the teſtator intended the deviſe of the premiſes ſhould take place only in the caſe of the birth of a poſthumous ſon, and that all the deviſes and limitations depended upon that event, and that as there was no poſthumous ſon, the eſtate deſcended:—ſecondly, that at the utmoſt the deviſes could only take place upon the moiety deviſed to the ſon living, and that for want of the birth of a poſthumous ſon the deviſe of the moiety deviſed to him could not operate.—EDITOR.

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" the remainder to the *heirs of the body* of my ſaid ſon John " Williams, lawfully begotten or to be begotten; the remainder " to my daughters for and during the term of their natural lives, " equally to be divided between them; the remainder to my ſaid " brother-in-law Iſaac Gale and his heirs, during the natural " lives of my ſaid daughters reſpectively; the remainder to the " heirs of the bodies of my ſaid daughters, equally to be divided " between them. And I do declare it to be my will and pleaſure, " that the ſhare or part of any of my ſaid daughters, that ſhall " happen to die, ſhall immediately veſt in the heirs of her body " in manner aforeſaid."

It is neceſſary to take notice, that Iſaac Gale died in the life-time of the teſtator, whereby the remainder limited to him and his heirs for the life of John Williams became, in point of law, a lapſed deviſe.

The diſpoſition therefore, at the death of the teſtator, ſtood thus; " to John Williams for the term of his natural life; the " remainder to the heirs of his body," without any interpoſing eſtate. The legal conſequence of which is, that if this be an eſtate tail in John Williams, it is an eſtate tail *in poſſeſſion*, by immediately uniting with the life-eſtate; and not an eſtate tail *in remainder*, as in the caſes of *Duncomb* and *Duncomb*, and *Coulſon* and *Coulſon*, it was held to be, by reaſon of the interpoſing eſtate, which ſubſiſted in both thoſe caſes. And indeed, were it otherwiſe, the plaintiff's replication could not be ſupported upon this general demurrer; for therein he pleads, that " by virtue of the " ſaid will, John Williams entered into the cloſe in queſtion, " and became ſeiſed thereof in his demeſne *as of fee tail*, to wit, " to him and to the heirs of his body iſſuing. "How far the interpoſition of this eſtate, to Iſaac Gale and his heirs, though it never took effect, is an evidence of the teſtator's *intention*, will afterwards come to be conſidered. At preſent the only queſtion is, what eſtate is by theſe words deviſed to John Williams, according to the general rule of law, uncontrouled by other conſiderations. And I apprehend there is no doubt, but that the words, in their legal conſtruction, convey an eſtate tail to John Williams.

For the rule of law, as laid down in *Shelley*'s caſe, 1 Rep. 104. and recognized in Co. Litt. 22. 319. 376. is, that " where the " anceſtor takes an eſtate of freehold, with a remainder, either " mediate or immediate, to *his heirs*, or the *heirs of his body*, " the word *heirs* is a word of limitation of the eſtate, and not " of purchaſe:" that is, in other words, that ſuch remainder veſts in the anceſtor himſelf, and the heir (when he takes) ſhall take by deſcent from him, and not as a purchaſor.

This rule, though too plain and poſitive to be openly queſtion-

ed or denied, has yet been obliquely reflected on; and insinuations have been thrown out, that it is a *strict* and a *narrow* rule, —founded upon feodal principles, which have long ago ceased; —that in *Shelley's case* it is only laid down *arguendo* by the *counsel*, and not by the *court*;—and that too in the case of a *deed* and not of a *will*.—It will not therefore be foreign to the present question, to make a short enquiry into the *reason*, the *antiquity*, and the *extent* of this rule.

Were it strictly true, that the origin of this rule was merely feodal, and calculated solely to give the lord his profits of tenure (either wardship or relief) upon the descent to the heir from the ancestor, of which the lord might be defrauded if the heir was to take by purchase, of which (by the way) I have never met with a single trace in any feodal writer;—still it would not shake the authority of the rule, or make us wish for an opportunity to evade it. There is hardly an antient rule of real property, but what has in it more or less of a feodal tincture. The common-law maxims of descent, the conveyance by livery of seisin, the whole doctrine of copyholds, and a hundred other instances that might be given, are plainly the offspring of the feodal system: but, whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven with its policy, that no court of justice in this kingdom has either the *power* or (I trust) the *inclination* to disturb them. The benefit of clergy took its origin from principles of popery: but is there a man breathing, that would therefore now wish to abolish it? The law of real property in this country, wherever its materials were gathered, is now formed into a fine artificial system, full of unseen connexions and nice dependencies; and he that breaks one link of the chain, endangers the dissolution of the whole.

But it is by no means clear, that this rule took its rise merely from feodal principles. I am rather inclined to believe, that it was first established to prevent the inheritance from being in *abeyance*. For, though it has been the doctrine of modern times, in order to effectuate executory devises, that, where a limitation of the inheritance depends in contingency, an *interim* estate *may* descend to the heir until the contingency happens, yet it is manifest to any one the least conversant in our antient books, that during the pendency of a *contingent remainder* in fee or in tail, the inheritance was formerly always (and in some cases is to this day) held to be in abeyance, or *in nubibus*, as they then expressed it. Thus if a gift be made to one for life, remainder to the right heirs of J. S. then living, the fee simple is in suspence or

abeyance

abeyance during the life of J. S. Bro. t. *Done.* 6. And ſo is Co. Litt. 342. b.

But this ſtate of abeyance was always odious in the law; and therefore the *whole* freehold or frank-tenement could not be in abeyance, except in the ſingle caſe of the death of a parſon, or other corporation ſole. Dyer, 71 Hob. 338. For in that interval there could be no ſeiſin of the land, no tenant to a præcipe, no one of ability to protect it from wrong or injury, or to anſwer its burthens or ſervices. And this is one principal reaſon, why a particular eſtate for years is not allowed to ſupport a contingent remainder; that the freehold may not be in abeyance: as is laid down in Hob. 153.

But when the *firſt* or particular eſtate was a *freehold*, there in ſome caſes the law allowed the *inheritance* to be put in abeyance, by the creation of a contingent remainder; but this very ſparingly and with great reluctance. For, during ſuch a beyance of the inheritance, many operations of law were totally ſuſpended. The particular tenant was rendered diſpuniſhable for waſte: for the writ of waſte can only be brought by him who is intitled to the inheritance. The title, if attacked, could not be completely defended: for there was no one in being, of whom the tenant of the freehold could pray in aid to ſupport his right. The mere right itſelf, if ſubſiſting in a ſtranger, could not be recovered in this interval: for, upon a writ of right patent, a leſſee for life cannot join the miſe upon the mere right. 1 Roll. Abr. 686. For theſe among other reaſons, the law was extremely cautious of admitting the inheritance to be in abeyance, unleſs in very particular caſes; as is laid down by Hobart and Doddridge, 2 Roll. Rep. 502. 506. Hob. 338. Indeed, where the particular eſtate was made to A. for life, with remainder to the right heirs of B. then living, there till the death of B. the inheritance was neceſſarily in abeyance; for B. the anceſtor, was intitled to nothing. But, where the anceſtor had already an eſtate of freehold limited to *him*, the law (to prevent ſuch abeyance) adjudged that a ſubſequent remainder to *his* heirs (who, during his life, are uncertain) was a remainder veſted in the anceſtor himſelf, and that his heirs ſhall claim by deſcent from him. For, as Hankford J. ſays in 11 Hen. 4. 74. "if land be given to a man "for term of his life, the remainder in tail, and for default of "iſſue the remainder to the right heir of the firſt tenant, the re- "mainder in fee ſimple takes its being by the poſſeſſion which "the firſt tenant hath." And though in this caſe it was argued at the bar, that the fee was *in nubibus* or in ſuſpence, yet this was

ſtrongly denied both by him and by *Hill*, another of the judges. And indeed, if we conſider it attentively, the whole of this rule amounts to no more than what happens every day in the creation of an eſtate in fee or in tail, by a gift to A. and to his heirs for ever, or to A. and to the heirs of his body begotten. The firſt words (*to A.*) create an eſtate for life: the latter (*to his heirs*, or *the heirs of his body*) create a remainder in fee or in tail; which the law, to prevent an abeyance, refers to and veſts in the anceſtor himſelf; who is thus tenant for life, with an immediate remainder in fee or in tail: and then, by the conjunction of the two eſtates, or the merger of the leſs in the greater, he becomes tenant in fee or tenant in tail in poſſeſſion. Hence therefore I am induced to think, that one principal foundation of this rule was to obviate the miſchief of too frequently putting the inheritance in ſuſpence or obeyance.

Another foundation might be, and was probably, laid in a principle diametrically oppoſite to the genius of the feodal inſtitutions; namely, a deſire to facilitate the alienation of land, and to throw it into the track of commerce, one generation ſooner, by veſting the inheritance in the anceſtor, than if *he* continued tenant for life, and the heir was declared a purchaſor. Therefore, where an eſtate was limited to the anceſtor for life, and afterwards (mediately or immediately) to his heirs, who are uncertain till the time of his death; the law conſidered the anceſtor as the firſt and principal object of the donor's bounty; and therefore permitted *him* (who, as it is ſaid, Co. Litt. 22. beareth in his body all his heirs, and who had the only viſible and notorious freehold in the land) to ſell it, deviſe it, where the cuſtom would permit, or charge it with his debts and incumbrances. And however narrow and illiberal the original eſtabliſhment of this rule, or the adhering to it in later times, may have been repreſented in argument, I own myſelf of opinion, that thoſe conſtructions of law, which tend to facilitate the ſale and circulation of property in a free and commercial country, and which make it more liable to the debts of the viſible owner, who derives a greater credit from that ownerſhip;—ſuch conſtructions, I ſay, are founded upon principles of public policy altogether as open and as enlarged, as thoſe which favour the accumulation of eſtates in private families, by fettering inheritances till the full age of poſterity now unborn, and which may not be born for half a century.

T. 5 E. 3. Diſcent. 14 M. 17 E. 3. 64. M. 24 E. 3. 30. 24 E. 3. 57. Bro. Sci. fac. 176.

Then, as to the *antiquity* of the rule in queſtion, it hath been ſaid, that in *Shelley*'s caſe it is only urged by the counſel for the defendant in their argument, and not relied on by the court. But

But the determination of the court is grounded on this rule, as well in *Shelley's* caſe, as in the *caſe of the Earl of Bedford,* Moor 720. where the ſame rule is likewiſe argued from by the counſel, as a known and undeniable maxim. And lord Coke in his commentary on Littleton (the great reſult of all his experience) has often adopted and relied upon it; and has cited in his margin, to ſupport it, a long liſt of authorities from the year-books; chiefly thoſe of Edward the third. I have looked into all theſe, and into ſome beſides; and ſhall only ſay, that they do moſt explicitly warrant the doctrine extracted from them by that great and learned judge.

M. 27 E. 3. 11. 27. Aſſ. pl. 60. H. 30 E. 3. 4 P. 32 E. 3. Fitzh. Relief. 4. 37. Aſſ. pl. 4. M. 38 E. 3. 17. 26. 39 E. 3. Fitzh. Diſcent. 5. H. 40 E. 3. 9. P. 40 E. 3. 20. T. 45 E. 3. 19. 5 E. 4. 2.

There is one caſe, which I have never ſeen cited, and which is by far the earlieſt of any that have occurred to me upon a diligent ſearch. In this the queſtion before the court was, whether an eſtate thus circumſtanced (that is, ſettled on a man for life, and after an immediate remainder in tail, to the right heirs of the tenant for life) was, on failure of the remainder in tail, liable to the debts of the tenant for life; and it was determined to be liable, upon the ground of it's being a fee ſimple veſted in the anceſtor; and therefore veſted in *him,* in order to prevent the inheritance from being in abeyance. This, I believe, is the very firſt caſe in our books, wherein this principle was eſtabliſhed. It is in the year-book of Edward 2d, publiſhed by ſerjeant Maynard, M. 18 Edw. 2. fol. 577. And the caſe was this, "John Abel, "having two ſons Walter and John, purchaſed the manor of "Fortyſgray in Kent; to hold to himſelf and Matilda his wife, "and Walter Abel his eldeſt ſon, and to the heirs of the body "of Walter begotten; and, if Walter died without heir of his "body, the manor ſhould remain to the right heirs of John the "father. Matilda the wife died; and Walter the ſon alſo died "without heir of his body. John the father became bound in a "ſtatute merchant to pay 100l. to B. at a day certain; and died, "leaving his younger ſon John his heir. After the day of payment was elapſed, the creditor ſued out a writ to the ſheriff "of Kent, to extend and deliver to him all the lands which "John Abel the father had, on the day of acknowledging the "ſtatute. The ſheriff returns, that he had delivered to other "creditors upon recognizances all the lands which John Abel "had in fee, except the manor of Fortyſgray, in which he had "only an eſtate for term of life. Upon this return it was argued, "that John the father had only the freehold for term of life, "the fee ſimple being limited to his heirs, who therefore took "by purchaſe and not by deſcent. But the court held the contrary; for which this reaſon (among others) is given by *Stonor J. viz. becauſe otherwiſe the fee and the right, after the*

"*death*

" *death of Walter the eldeſt ſon, would have been in nobody.* And " therefore *Beresford C. J.* gave the rule, that execution ſhould " be awarded upon this manor of Fortyſgray."

The rule of law, deducible from hence, is well and emphatically collected by Fitzherbert, in his abridgment, t. Feoffment. pl. 109. who refers (I preſume) to this caſe (though it was not then in print) when he ſays, that it was reſolved in M. 18 Edw. " 2. that if a man give land to B. for term of life, remainder to " C. in tail, remainder to the right heirs of B. in fee, this re- " mainder in fee *veſts in B.* as much as if the remainder was li- " mited to B. and his right heirs in fee; and the right heir of " B. ſhall have this *by deſcent and not as purchaſor.*"

And from all theſe authorities I infer, that the rule in queſtion is a rule of the higheſt antiquity; not merely grounded on any narrow feodal principle, but applied, in the firſt inſtance we know of, to the liberal and conſcientious purpoſe of facilitating the alienation of the land by charging it with the debts of the anceſtor.

However, it hath been urged, that though the rule *muſt* be allowed with reſpect to eſtates created by *deed*; yet it doth not follow, that it alſo extends to *deviſes*: and ſo the maſter of the Rolls is ſaid to have declared (in the caſe of *Papillon* and *Voice*, 2 Wms. 477.) " that he knew of no caſe, where lands being " *deviſed* to A. for life, remainder to the heirs of the body, this " (in caſe of a will) had been conſtrued an eſtate tail in A." But either the reporter has miſapprehended his honour's meaning, or elſe he had ſurely forgotten the caſes of *Whiting* and *Wilkins*, 1 Bulſtr. 219. *Rundle* and *Healy*, Cart. 170. and *Broughton* and *Langley*, Lutw. 814. wherein that point is reſolved *in terminis*. It will therefore be ſufficient to obſerve upon this head, that the rule in Co. Litt. 22. 319, is laid down in general terms, " *where* and " *whereſoever* the anceſtor taketh an eſtate for life, &c." and in Co. Litt. 376. and alſo in *Shelley's caſe*, and in Moor 720, *the Earl of Bedford's caſe*, it is extended to *all conveyances*. And deviſes of lands (which differ totally from teſtaments of chattels) are held in all our books, and particularly in *Windham* and *Chetwynd*, 1 Burr. 429. to be a ſpecies of *conveyance*; and this is the reaſon why lands purchaſed after the execution of it, cannot paſs by ſuch a deviſe.

But, however ſtrongly this rule may be founded in antiquity, and ſupported by reaſon and authority, I have in the outſet conceded, that when it is applied to *deviſes*, it may give way to the plain and manifeſt *intent* of the deviſor; provided that intent be conſiſtent with the great and immutable principles of our legal

policy;

policy; and provided it be ſo fully expreſſed in the teſtator's will, or elſe may be collected from thence by ſuch cogent and demonſtrative arguments, as to leave no doubt in any reaſonable mind, whether it was his intent or no. Which leads me to the laſt conſideration:

Whether there is any ſuch *plain* and *manifeſt* intent of the deviſor, expreſſed in or to be collected from any part of this deviſe, as may controul the legal operation of the words, and at the ſame time be conſiſtent with the fundamental rules of law? And I am of opinion, that there is no ſuch plain intent.

In order to decide this queſtion *clearly*, it is neceſſary to ſtate it *accurately*. And firſt, let us ſee what the queſtion is *not*.

The queſtion is not, whether the teſtator intended that his ſon John ſhould have a power of alienation. If that was all, the diſpute would be ſoon at an end; for his intention is moſt clearly expreſſed (and it is the only clear intent I can find) that the ſon ſhould not have ſuch a power. And, if a conveyance were now to be directed of this eſtate by a court of equity, it would probably be in ſtrict ſettlement, according to the caſe of *Lennard* and *the Earl of Suſſex*, 2 Vern. 526. But that and all ſimilar caſes (of directing a conveyance by a court of equity) muſt be laid out of the preſent queſtion: for we are now in the caſe of a *legal* eſtate, *executed* either one way or the other, and not of an *executory truſt*. And if the teſtator has in fact deviſed an eſtate to John, with which ſuch a reſtriction of alienation is incompatible by the fundamental rules of law, the reſtriction is null and void.

Again: the queſtion is not, whether the teſtator intended that his ſon John ſhould have only an eſtate for life. I believe there never was an inſtance, when an eſtate for life was expreſsly deviſed to the firſt taker, that the deviſor intended he ſhould have any thing more. But if he afterwards gives an eſtate to the heirs of the tenant for life, or to the heirs of his body, it is the conſequence or operation of law that in this caſe ſupervenes his intention, (as Lord Hale expreſſes it, 1 Ventr. 225. 379.) and veſts a remainder in the anceſtor; which remainder, if it be *immediate*, merges his eſtate for life, and gives him the inheritance in poſſeſſion; but if *mediate* only, by reaſon of ſome interpoſing eſtate, then it veſts the inheritance in the tenant for life, as a future intereſt, to take effect in poſſeſſion when the interpoſition is determined. And therefore it has been frequently adjudged, that though an eſtate be deviſed to a man for his life *only*, or for life *et non liter*, or with any other reſtrictive expreſſions; yet, if there be afterwards added apt and proper words to create an eſtate of inheritance in his heirs or the heirs of his body, the extenſive

tenſive force of the latter words ſhall overbalance the ſtrictneſs of the former, and make him tenant in tail or in fee. Theſe therefore are *not* the true queſtions in the preſent caſe.

But I apprehend the true queſtion of intent will turn, not upon the quantity of eſtate intended to be given to *John the anceſtor*; but upon the nature of the eſtate intended to be given to *the heirs of his body*. That the anceſtor was intended to take an eſtate for life, is certain: that his heirs were intended to take after him, is equally certain: but *how* thoſe heirs were intended to take, whether as *deſcendants*, or as *purchaſors*, is the queſtion. If the teſtator intended they ſhould take as *purchaſors*, then, John the anceſtor remained only tenant for life: If he meant they ſhould take by *deſcent*, or had formed no intention about the matter, then, by operation and conſequence of law, the inheritance firſt veſted in the anceſtor. The true queſtion therefore is,—Whether the teſtator has or has not plainly declared his intent, that the heirs of the body of John Williams ſhall take an eſtate by *purchaſe*, intirely detached from and unconnected with the eſtate of their anceſtor? or, in other words, Whether he meant to put an expreſs negative on the general rule of law, which veſts in the perſon of the anceſtor (when tenant of the freehold) an eſtate that is given to the heirs of his body? But, in order to ſay this, we muſt ſuppoſe that the teſtator was apprized of this rule, and meant an exception to it: of which there is no evidence whatſoever. And here lies the great difficulty, which the defendant in error muſt encounter. It is not incumbent on the plaintiff to ſhew, by an expreſs evidence, that his teſtator meant to *adhere* to the rule of law; for that is always ſuppoſed till the contrary is clearly proved; but it is incumbent on the defendant to ſhew, by plain and manifeſt indications, that the teſtator intended to *deviate* from the general rule; for that is never ſuppoſed, till made out, not by conjecture but by ſtrong and concluſive evidence.

Let us therefore ſee, what evidence has been uſually required to demonſtrate ſuch a *devious* intention, and what the evidence is that is relied on in the preſent caſe.

I am far from maintaining, that by a deviſe to a man's heirs, or the heirs of his body, they ſhall never take as purchaſors in any caſe. But I have never obſerved it to be allowed, excepting in one of theſe four ſituations; not one of which will apply to the preſent caſe.

1. Where no eſtate at all, or (which is the ſame thing in the idea of our ancient law) where no eſtate of freehold is deviſed

viſed to the anceſtor. Here the heirs cannot take by deſcent, becauſe the anceſtor never had in him any deſcendible eſtate. And this muſt always be the caſe, where the anceſtor is dead at the time of the deviſe, as in the known caſe of John de Mandeville (Co. Lit. 26.) the heir then taking a veſted eſtate by purchaſe. It is alſo the ſame, if the anceſtor be living, and has no *ſort* of eſtate deviſed to him; only that then the eſtate of the heir is contingent, becauſe *nemo eſt hæres viventis*. And, if the anceſtor has only the deviſe of a *chattel* intereſt, with a ſubſequent eſtate to his heirs, the heirs muſt likewiſe take as purchaſors, or not take at all. For, if between the term of the anceſtor and the eſtate of his heirs, there is no veſted freehold remainder, the heirs can only take by way of *executory deviſe*; which, *ex vi termini*, implies an eſtate *not executed* in the anceſtor. Or, if there *be* any ſuch veſted eſtate of freehold, interpoſed between the anceſtor's term and the contingent remainder to his heirs, that contingent remainder is ſupported entirely by the interpoſed eſtate, and does not derive its being or any degree of aſſiſtance from the chattel eſtate of the anceſtor.

2. The next caſe is, where no eſtate of *inheritance* is deviſed to the *heir*; as in the caſe of *White* and *Collins*, Com. 289. (cited by the counſel for the defendant). There the deviſe was to Frank Mildmay for life, with a power of jointuring, and after his death, (and jointure, if any be) to the heir male of his body lawfully begotten, during the term of his natural life: remainder over. Common ſenſe will here tell us, that when no eſtate of *inheritance* is deviſed to the heir male of the body, he cannot take by deſcent as heir.

3. The third caſe is, where ſome words of explanation are annexed by the deviſor himſelf to the word *heirs*, in the will: whereby he diſcovers a conſciouſneſs, diſtruſt, or apprehenſion, that he may have uſed the word improperly, and not in its legal meaning; and therefore he in a manner retracts it, he corrects the inaccuracy of his own phraſe, and tells every reader of his will how he would have it underſtood. Thus, in *Burchel* and *Durdant* (2 Ventr. 311. Carth. 154.) the deviſe was, "in truſt "for Robert Durdant for life, and after his deceaſe to the heirs "male of his body, *now living*." As if the teſtator had ſaid, "I do not mean a perpetual ſucceſſion in the male line of Robert Durdant, which perhaps may be the legal ſenſe of *heirs male of his body*; but I mean by that expreſſion only ſuch of his ſons as are at preſent born and known to me." And accordingly the court held, that George Durdant, the ſon of Robert, and living when

when the will was made, ſhould take the eſtate *as a purchaſor*. So in *Liſle* and *Gray* (2 Lev. 223.) the words were, "to Edward "for life, remainder to his 1ſt, 2d, 3d, and 4th ſons in tail "male; *and ſo* to all and every other the heirs male of the bo- "dy of Edward." Which words *and ſo* (together with the manifeſt reaſon of the thing) plainly ſhewed that the "other heirs "male of the body" in the ſubſequent clauſe of the will, were to be underſtood juſt *ſo* as the "1ſt, 2d, 3d, and 4th ſons" were to be underſtood in the preceding. And in *Lowe* and *Davis* (lord Raym. 1561.) when the teſtator had firſt deviſed, in a looſe unguarded manner, to "his ſon Benjamin and his heirs "lawfully to be begotten," he immediately recollects himſelf and adds, by way of explanation, "that is to ſay, to his 1ſt, "2d, 3d, and every other ſon and ſons ſucceſſively, lawfully "to be begotten of the body of the ſaid Benjamin, &c." This deviſe to the heirs, thus explained, was held to be by way of purchaſe. So in the caſe of *Doe on demiſe of Long* v. *Laming* (Burr. 1100.) the deviſe was of *Gavelkind* lands "to Anne Corniſh "and the heirs of her body begotten, *as well female as male, to* "*take as tenants-in common*." Now, ſince Gavelkind lands cannot deſcend to heirs female as well as males (as is expreſsly declared by the ſtatute *de prærog. regis*, 17 Edw. 2. c. 16.) nor can heirs, as ſuch, be tenants in common but coparceners, it is clear, that by the words *heirs of the body*, (thus explained by the words *female as well as male*, and *to take as tenants in common*) the deviſor could only mean to deſcribe the children of Ann Corniſh.

4. The laſt caſe, wherein heirs of the body have been held to be words of purchaſe, is where the teſtator hath ſuperadded freſh limitations, and grafted other words of inheritance upon the heirs to whom he gives the eſtate: whereby it appears, that thoſe heirs were meant by the teſtator to be the root of a new inheritance, the ſtock of a new deſcent; and were not conſidered merely as branches derived from their own progenitor. Where the heir is thus himſelf made an anceſtor, it is plain, that the denomination of *heir of the body*, was merely deſcriptive of the perſon intended to take, and means no more than "ſuch ſon or "daughter of the tenant for life, as ſhall alſo be heir of his bo- "dy." The caſes of *Liſle* and *Gray*, *Lowe* and *Davis*, and *Long* and *Laming* fall under this head as well as the other: theſe having alſo words of limitation ſuperadded to the word *heirs*, as well as the explanatory words I before took notice of. Thus too in *Cheek* and *Day* (which, as lord Raymond obſerves, Fitzg. 24. Forteſc. 77. is the true name of the caſe uſually called *Clerk* and *Day*) the deviſe, as there cited from the roll, was "to my daughter Roſe for life, and if ſhe marry after my death "and

" and have any heirs lawfully begotten, I will that her heir " ſhall have the lands after my daughter's death, and *the heirs of* " *ſuch heir.*" So likewiſe *Archer's caſe*, 1 Rep. 66. is " to the " right and next heir of Robert Archer, (the tenant for life) " and to the *heirs of his body* lawfully begotten for ever." And the caſe of *Backhouſe* and *Wells*, 2 Wms. 476. is " from and " after the deceaſe of the tenant for life to the iſſue male of his " body, and to the *heir male of ſuch iſſue male.*"

All the caſes therefore that have hitherto occurred, from the ſtatute of wills to the preſent time (a period above two centuries) all the caſes, I ſay, in which *heirs of the body* have been conſtrued to be words of purchaſe, are reducible to theſe four heads:—either where no eſtate of freehold is given to the anceſtor;—or where no eſtate of inheritance is given to the heir;—or where other explanatory words are immediately ſubjoined to the former;—or, laſtly, where a new inheritance is grafted on the heirs of the body:—none of which is the preſent caſe. We have therefore no authority from precedents to warrant ſuch a conſtruction as is now contended for.

I do not however ſay, that this conſtruction can never be made under other circumſtances than thoſe which I have now mentioned: but only, that at preſent I am not *aware of* any other circumſtances, than can warrant the ſame conſtruction. At the ſame time I allow, that the ſame conſtruction may and ought to be made, whenever the intent of the teſtator is equally clear and manifeſt.

What then is the evidence of this intent in the preſent caſe? It may be reſolved into two particulars. 1. The teſtator's previous declared intention, " that none of his children ſhould ſell " or diſpoſe of his eſtate for longer term than his own life," together with his conſequent diſpoſition " *to that intent:*" and, 2. The interpoſed eſtate to Iſaac Gale and his heirs, during the life of the teſtator's ſon. For, as to what was mentioned at the bar, of his making the daughters and the heirs of their bodies tenants in common, and directing the ſhare of each daughter immediately upon her death to veſt in the heirs of her body;—this is plainly done to prevent the inconvenience of ſurvivorſhip among the daughters; which muſt otherwiſe have been the conſequence, according to the rule laid down, Co. Litt. 25. b. that " where there is a gift to two women and the heirs of their bo- " dies, they have a joint eſtate for life, and ſeveral inheritan- " ces."

Nor indeed do I think much ſtreſs can be laid on the ſecond particular, the interpoſed eſtate of Iſaac Gale and his heirs. For had that been expreſsly created to preſerve contingent remainders,

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the case of *Coulson* and *Coulson* (2 Ath. 250.) is an express authority, that this will not make the heir of the body a purchasor. Much has been said, and much has been insinuated at the bar to discredit that case. But I hold it to have been determined upon sound legal principles. For the misapprehension of a testator, in thinking the remainders were contingent when they were not so, cannot alter the rule of law. But were it otherwise, had the case of *Coulson and Coulson* been decided upon dubious grounds, I should tremble at the consequences of shaking its authority, after it has now been established for thirty years, and half the titles in the kingdom are by this time built upon its doctrine. But there is no occasion, upon the present question, to disturb the case of *Coulson* and *Coulson*, by either affirming or denying it. For, in the devise to Isaac Gale and his heirs, there is no such purpose *avowed* as the preserving contingent remainders: it is only to be *conjectured* and guessed at. The purpose of the testator *might* be, (as in the case of *Duncomb* and *Duncomb*) to prevent dower in the wife of his son, or tenancy by the curtesy in his daughter's husbands;—especially as he had, by another clause in his will, destroyed the joint-tenancy of his daughters, which would otherwise (according to 2 Roll. Abr. 90.) have prevented the curtesy of their husbands. And where it is possible there may be more intents than one, the selecting of the *true* intent is at best but probability and guess-work; and does not amount to that *declaration plain*, which lord Hobart and lord Hardwicke require, before it shall set aside a positive rule of law.

If this be so, we are driven back to the introductory words as the only evidence of this intent: and then the result of the whole matter is, that the testator, having declared his intent, that his son shall not aliene his land, he *to that intent* gives his son an estate to which the law has annexed the power of alienation; an estate to himself for life, with remainder to the heirs of his body. Now, what is a court of justice to conclude from hence? Not, that a tenant in tail, thus circumstanced, shall be barred of the power of alienation: this is contrary to fundamental principles. —Not, that the devise shall take a different estate from what the legal signification of the words imports: this, without other explanatory words, is contrary to all rules of construction.—But, plainly and simply this; that the testator has mistaken the law, and imagined that a tenant for life, with first an interposed estate, and then a remainder to the heirs of his body, could not sell or dispose of this interest.

My lord chief baron on the argument put a question to the counsel for the defendant, to which no satisfactory answer was

or

or could be given. Suppoſe, after the like declaration of his intent, the teſtator had deviſed the premiſes to his ſon and his heirs for ever;—Would that have made the ſon tenant for life only, and his heirs take as purchaſers? Moſt clearly not. This caſe is the ſame in kind, and differs only in ſpecies. The words now uſed are as apt legal words to create an eſtate tail, as thoſe an eſtate in fee. And as I conceive, that when a teſtator has deviſed a veſted eſtate, his creation of a truſt to preſerve contingent remainders will not turn it into a caſual executory intereſt; ſo alſo I think, that when he has (though ignorantly) deviſed an eſtate that *is* alienable, no previous or concomitant intent to prevent his deviſee from alienating ſhall alter the nature of that deviſe.

Will it be ſaid, that when the teſtator's intent is manifeſt, the law will ſupply the *proper* means to carry it into execution, tho' he may have uſed *improper* ones? This would be turning every deviſe into an executory truſt, and would be arming every court of law with more than the juriſdiction of a court of equity; a power to frame a conveyance for the teſtator, inſtead of conſtruing that which he has already framed.

Will it then be ſaid, that becauſe the means marked out by the teſtator will not anſwer the end propoſed, therefore he intended to uſe other means and not thoſe which he has marked out? This conſequence, I apprehend, will not follow by any rules of law or logic. For then it muſt be ſuppoſed, that every man, who has ſo in view a particular end, knows alſo and is ſure to employ the moſt effectual means to carry it into execution; which is paying too great a compliment to human wiſdom. Let us ſee how this argument will ſtand in form.—The teſtator intended to uſe thoſe which were the moſt effectual means to prevent his ſon from ſelling his eſtate; that the ſon's heir ſhould take by purchaſe was the moſt effectual means: therefore the teſtator intended that the heir ſhould take by purchaſe. Here the firſt propoſition will not be granted, that he intended to uſe thoſe which were the moſt effectual means; for this intent implies his knowledge of what were the moſt effectual, of which there is no ſhadow of evidence. Or, put it otherwiſe;—the teſtator intended to uſe *what he thought* the moſt effectual means: but he thought the heir's taking by purchaſe was the moſt effectual: therefore he intended that the heir ſhould take by purchaſe. Here the ſecond propoſition can never be proved; that the teſtator thought any ſuch thing. The true conſequence I conceive to be this; that becauſe the means marked out by the teſtator are not adequate to the end propoſed, therefore he was miſtaken in their efficacy.

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If a man propoſes to qualify a ſon to ſit in the houſe of commons, and *to that intent* deviſes to him an annuity of 300l. *per annum* for 99 years, if he ſo long lives:—we cannot argue from this declared intent of the teſtator, that this term of years ſhall be conſtrued to be a freehold eſtate for life, becauſe otherwiſe it would not anſwer the intent. We ſhould rather conclude, that the teſtator was ignorant of the diſtinction between the two eſtates, and had unfortunately choſen that which was unfit for his purpoſe.

The caſe of *Popham* and *Bamfield* (as the two parts of it are reported in 1 Vern. 79. 1 Wms. 54.) was in this reſpect ſtronger than the preſent. One Rogers had deviſed a large eſtate to the teſtator's Popham's ſon, on condition that his father would alſo ſettle two-thirds of his eſtate on the ſon and his *heirs male*. Now, though the teſtator was under a ſtrong obligation, by this condition, to give an eſtate to his ſon and *his heirs male*;—tho' he recited in his codicil that he *had* deviſed the lands to his ſon and *heirs male of his body*;—which were indiſputable evidences of his intention to give his ſon an eſtate in tail male;—yet, having in his will by expreſs words made his ſon only tenant for life, with remainder to his firſt and other ſons in tail, the lord-keeper, aſſiſted by the two chief juſtices, the maſter of the rolls, and Mr. Juſtice Powel, all agreed that the eſtate muſt remain in ſtrict ſettlement. And, if an intention of the teſtator (ſo manifeſtly and directly proved) was not in that caſe ſufficient to make the words "firſt and other ſons" be conſtrued "heirs "male of the body;"—much leſs in the preſent inſtance, ſhall it turn the words "heirs of the body" into "firſt and other "ſons."

Upon the whole, I conclude, that though it *does* appear, that the teſtator intended to reſtrain his ſon from diſpoſing of his eſtate for any longer term than his life, and *to that intent* contrived the preſent deviſe; yet, it *does not* appear by any evidence at all, much leſs by *declaration plain*, that in order to effectuate this purpoſe he meant that the heirs of the body of his ſon ſhould take by *purchaſe* and not by *deſcent*, or even that he knew the difference.

The conſequence is, that by the legal operation of the words, which are not in my opinion controuled by any manifeſt intent to the contrary, the heir could only take by deſcent, and of courſe John Williams the ſon was tenant in tail of the premiſes, and duly authorized to ſuffer the recovery that has been pleaded;—and therefore I am of opinion that the judgment below ſhould be reverſed.

OBSER-

OBSERVATIONS

ON THE

RULE,

"That *heirs of the body*, or other inheritable words, after an "eſtate for life, ſhall operate as words of *limitation*, not "of *purchaſe*."

CHIEFLY WITH A VIEW TO THE

APPLICATION of that RULE to LAST WILLS.

AN

ARGUMENT

ON THE

APPEAL from CHANCERY,

IN THE CASE OF

Mrs. WICKER and Sir THOMAS and Lady BROUGHTON

AGAINST

JOHN MITFORD, Esquire.

Delivered at the Bar of the House of Lords in June 1782.

[The following argument was compoſed by the editor as junior counſel in the caſe of an appeal to the houſe of lords from chancery, and in that character was actually delivered by him at the bar of the houſe of lords from written notes. In the courſe of the argument, the reader will find ſome diſcuſſions of a *general* nature, relative both to the curious and difficult learning of executory deviſes of perſonal eſtate, and to the important diſtinction between taking *per capita* and taking *per ſtirpes*, as well on the diſtribution of an inteſtate's perſonal eſtate as on legacies. Excluſively of the few notes, there is ſcarce any addition to or alteration of the argument as it was originally expreſſed. The ſtate of the caſe, given in a note at the beginning of the argument, is an abridgment of the facts by the editor, founded on the printed caſe before the lords on the part of the appellants. It ſhould, however, be obſerved, that the editor is not aware of any material difference in the ſtatement of facts between the two caſes. If there had been any controverſy about facts, he would not have abridged them from the caſe on one ſide only.]

AN

ARGUMENT

ON THE

APPEAL from CHANCERY,

IN THE CASE OF

Mrs. WICKER and SIR THOMAS and LADY BROUGHTON

AGAINST

JOHN MITFORD, ESQUIRE.*

MY LORDS,

IN this caſe, the general queſtion between the appellants and reſpondent is, who are entitled to the 5,402l. 7s. 4d. ſurplus of the real and perſonal eſtate of the teſtator Wm. Wicker.

On the one hand, the reſpondent claims the *whole* of this fund under an *executory deviſe* in the will of William Wicker, on the contingency

* The appellants were Mrs. Charlotte Wicker, widow and executrix of John Wicker, Eſq; and Sir Thomas Broughton Baronet, and dame Mary his wife, daughter and only child of the ſaid John Wicker. The reſpondent was John Mitford, Eſq; ſecond and only younger ſon of Mrs. Sarah Mitford, ſiſter of the ſaid John Wicker.

The ſubject of the appeal was a ſum of 5402l. 7. 4d. $\frac{3}{4}$ being the ſurplus of the real and perſonal eſtate of William Wicker, Eſq; brother of the ſaid John Wicker and Sarah Mitford. The reſpondent claimed the *whole* of this ſurplus under the will of his uncle William Wicker, as only younger ſon of the teſtator's ſiſter Sarah Mitford. The appellants claimed the *whole* or at leaſt a *moiety* of the ſame ſurplus under Mr. John Wicker, as reſiduary deviſee and legatee of his brother William Wicker. The title of the different claimants depended on the conſtruction of a deviſe in the will of Mr. William Wicker, on the contingency of his *dying without iſſue*, of the whole ſurplus of his fortune real and perſonal, *equally to be divided between any ſecond or younger ſons* of his brother John and ſiſter Sarah Mitford.

The ſubſtance of the caſe was as follows:

William Wicker, Eſq; having been lately married, and being without iſſue, made his will, dated the 12th of December 1750, to this effect. After reciting that he had a fortune of about 6000l. at intereſt upon ſecurities, and that he was ſeiſed in fee of a freehold meſſuage and malt-houſe in the pariſh of Henfield in Suſſex, and of a copyhold malt-houſe in Old Shoreham in the ſame county, he deviſed the ſaid meſſuage and malt-houſes unto his brother John Wicker, Eſq; and his heirs, upon truſt after teſtator's deceaſe to ſell the premiſes, and to apply the monies from the ſale in manner after directed. The teſtator next gave to his wife Elizabeth an annuity of 100l. for her life payable quarterly, upon a condition that *he did*

contingency of his *dying without iſſue*, to the *ſecond* or *younger ſons* of his brother John Wicker and his ſiſter Sarah Mitford. On the

did not LEAVE *any child, or more than two children, at the time of his deceaſe*; but *if he ſhould leave three or more children living at the time of his deceaſe*, then only 50l. a-year for her life. Next he gave the uſe of ſome houſhold furniture to his wife for her life. Then the will goes on in the words following. "And whereas I am but "lately married, ſo that it is very uncertain what children it may pleaſe God to "bleſs me with; therefore under ſuch uncertainty I do make the following diſpo-"ſition of my fortune, (that is to ſay) In caſe I ſhould *leave* one only ſon, and no "other child, then I do give ſuch only ſon the *whole* of my fortune of which I "die poſſeſſed; and if I ſhould *leave* one ſon and one daughter, then I give to ſuch "ſon the ſum of 4000l. and to ſuch daughter the ſum of 2000l. and in caſe I "ſhould *leave two* or *more* ſons and no daughters, then I do give the *whole* of my "ſubſtance and fortune to be equally divided between them *ſhare and ſhare alike*. "And in caſe I ſhould *leave* no ſon, but *one or more daughter or daughters*, then and in "ſuch caſe I do give the *whole* of my ſubſtance or fortune to be equally divided "between them; if more than one daughter, *and if but one daughter, ſuch daughter "to have the whole*. And in caſe I ſhould *leave* two or more ſons, and one or more "daughter or daughters, then and in ſuch caſe I do give the ſum of 4000l. to be "divided between the ſons, and 2000l. between the daughters, if more than one. "*And in caſe it ſhall happen that* I SHOULD DIE WITHOUT ISSUE, *then I do give and "bequeath the whole of my fortune or ſubſtance equally to be divided between any ſecond or "younger ſons of my brother* John Wicker, *and my ſiſter* Sarah, *wife of* William Mit-"ford, *Eſq*; *by him or any other huſband ſhe may hereafter happen to intermarry with*. "And in caſe it ſhall happen that my ſaid ſiſter AND brother ſhall not have any "ſuch ſecond or younger ſon; then, and in ſuch caſe, I do give and bequeath my "ſaid fortune or ſubſtance *to my ſaid brother* Wicker AND *ſiſter* Mitford, *equally to be "divided between them, ſhare and ſhare alike, and to their reſpective executors or admini-"ſtrators*. Provided always and my will and meaning is, and I do hereby will, "direct, and appoint, that the ſeveral and reſpective fortunes or portions either of "my own or my ſaid brother's and ſiſter's children ſhall be ſeverally and reſpec-"tively paid unto them by my executor at their ſeveral and reſpective ages of 21 "years, with the beſt intereſt in the mean time that can be gotten for the ſaid ſe-"veral fortunes of my own children, for and towards their ſupport, maintenance, "and education. And I do give unto my ſaid brother John Wicker full power "and authority to take in and place out my ſaid monies from time to time in "ſuch manner as he ſhall think fit. And I do commit the guardianſhip and care "of my children unto my ſaid brother, to be brought up and educated by him in "ſuch manner as he ſhall think fit, *in caſe I ſhall* LEAVE *any ſuch at the time of my "death; or in caſe my ſaid wife ſhall be enſeint or with child at the time of my deceaſe*, "and ſuch child ſhall live: which I hope my ſaid brother will undertake and per-"form, it being my earneſt requeſt to him ſo to do." The teſtator next be-queathed 10l. a-year to his ſervant John Jones for life, and various ſmall lega-cies to other ſervants and others, with the leaſe of a houſe and farm and alſo the ſtock upon the latter to his wife abſolutely. Then came the following be-queſts, "Provided always, and my will and meaning is, that *notwithſtanding any "thing herein mentioned*, IN CASE I SHALL DIE WITHOUT ISSUE, *and my ſiſter "Mitford ſhall not have any ſecond or younger ſon born of her body, that then, and in ſuch "caſe*, I do give and bequeath THE ONE-HALF *of my fortune or ſubſtance unto* Wil-"liam Mitford *eldeſt ſon of my ſaid ſiſter* Mitford, if he ſhall be living *at the time of "my deceaſe*; but in caſe of his death, and of the death of my ſiſter before me, then, "and in ſuch caſe, I give *the whole* thereof unto my ſaid brother *Wicker*, and his "executors or adminiſtrators. Alſo, after the death of my ſaid wife *Elizabeth*, "I give my houſhold goods, plate, and linen (the uſe whereof I have given to my "wife for her life) I give and bequeath to my eldeſt ſon, if any ſuch I ſhall have; "or, *in default of ſuch*, to any daughters I may have, equally between them, *ſhare "and ſhare alike*. Alſo, if I ſhall have any ſon that ſhall live to attain the age of 25

"years,

the other hand, the appellants ſubmit, that the appellant Mrs. Wicker, as executrix of the teſtator's brother John Wicker, is

" years, I will and direct my executor to allow him 10l. a-year for pocket-money, " to be paid him weekly, and to keep a horſe to ride upon. And I do nominate " conſtitute and appoint my ſaid brother *John Wicker* ſole executor of this my laſt " will-and teſtament, *and do give him all the reſt and reſidue of my eſtate not herein be-* " *fore given and diſpoſed of.*"

On the 1ſt of April 1751, the teſtator made a codicil giving ſome ſmall ſpecific legacies.

In 1751, ſoon after this codicil, the teſtator died without iſſue, leaving his ſaid brother John Wicker his heir, and him and his ſaid ſiſter Sarah Mitford his next of kin; and alſo leaving his ſaid wife Elizabeth his widow.

John Wicker, the ſole executor, proved the will.

In 1752, the teſtator's brother John Wicker not then having any ſon, and his ſiſter Sarah having an only ſon William Mitford, an infant, the latter by his next friend brought his bill in chancery againſt the teſtator's brother John Wicker and his widow Elizabeth, and John Jones the annuitant of 10l. a-year. By this bill the infant, inſiſting that he on the teſtator's death became entitled to one moiety of his perſonal eſtate, after payment of debts and legacies, prayed an account, and to have a moiety of the clear ſurplus of the teſtator's real and perſonal eſtate placed out for the benefit of him the plaintiff until he ſhould attain twenty-one, and to have maintenance in the mean time.

Anſwers having been put in, the cauſe was heard the 21ſt of February 1754, in the abſence of the lord chancellor, before the then maſter of the rolls, who made a decree. By this decree, after various directions for an account, it was ordered, that the clear ſurplus of the capital of the teſtator's perſonal eſtate, and the money from ſale of his real eſtate, ſhould be placed out at intereſt on government or real ſecurities, in the name of truſteee to be approved by the maſter, ſubject to the annuities, and upon the truſts and the contingencies in the will. It was alſo ordered, that out of the intereſt the annuities to the teſtator's widow and to John Jones ſhould be paid. And the court declared, that the defendant John Wicker was entitled to the ſurplus of ſuch intereſt, and to the ſurplus intereſt of the teſtator's perſonal eſtate, and to the rents and profits of his real eſtates accrued ſince his death, as reſiduary legatee: and that when any of ſuch contingencies ſhould happen, any perſon or perſons who ſhould be entitled to the ſaid ſecurities, ſhould be at liberty to apply to the court touching the ſame, as occaſion ſhould require.

In June 1754 there was a rehearing of the cauſe on the petition of the then plaintiff before lord chancellor Hardwicke; but the decree was affirmed.

On the 17th of March, 1756, the maſter made his reports of the accounts directed, and found the clear ſurplus of money from the teſtator's perſonal eſtate, and ſale of his real eſtate, to be 5402l. 7s. 4d$\frac{3}{4}$.

The teſtator's ſiſter, Sarah Mitford, having had a ſecond ſon born the 13th of November 1754, namely the reſpondent John Mitford, a petition on his behalf was preferred in the ſaid cauſe in March 1756, claiming *one moiety* of the ſaid 5402l. 7s. 4d$\frac{3}{4}$. ſurplus money as payable at twenty-one, with maintenance in the mean time, and praying, amongſt other things, to have an allowance ſettled accordingly out of the intereſt. But upon the hearing of this petition, the 21ſt of March 1756, it was diſmiſſed by the lord chancellor, on the ground of the petitioner's not being entitled to the intereſt before twenty-one.

In 1767, John Wicker, the brother of the teſtator William Wicker, died, *without having had any ſon*, and by his will he gave his real and perſonal eſtate, ſubject to his debts and legacies, to his wife the appellant Mrs. Wicker, in truſt for ſuch perſons as his daughter the appellant lady Broughton ſhould by her will appoint therein.

In November 1775, the reſpondent, the only younger ſon of Sarah Mitford, the ſiſter of the teſtator William Wicker, attained 21; and in 1777 the reſpondent's mother died, leaving the reſpondent, her only younger ſon.

In 1778, the reſpondent filed a bill in chancery againſt the appellants, claiming, as only younger ſon of his deceaſed mother Sarah Mitford, a right to the *whole* of the 5402l. 7s. 4d$\frac{3}{4}$. ſurplus money from the real and perſonal eſtate of the teſtator

William

entitled to the *whole* of the fund in queſtion, or at leaſt is entitled to *a moiety*.

The material facts on which the claim ariſes, excluſive of the will of William Wicker, are, that the teſtator died without ever having had any iſſue; that at the time of the will neither his brother John Wicker, nor his ſiſter Sarah Mitford, had any younger ſon; that the brother and ſiſter both ſurvived the teſtator; that the brother is ſince dead, without having had any *male* iſſue; and that the teſtator's ſiſter Mrs. Mitford is alſo dead, leaving the reſpondent *her only younger ſon*.

The principle of the reſpondent's claim is, that the teſtator intended, if there ſhould be ſeveral younger ſons of his brother and ſiſter, to divide the ſurplus of his eſtate amongſt ſuch younger ſons *per capita*; or if there ſhould be only one younger ſon, whether of his brother or ſiſter, to give the *whole* to him.

Before entering into a diſcuſſion of the reſpondent's pretenſions, there is a preliminary obſervation, which I conceive to be material to the intereſts of the appellants. If the reſpondent cannot make out his title under the executory deviſe on the contingency of the teſtator's dying *without iſſue*, the title of the appellant Mrs. Wicker as executrix of Mr. John Wicker, and through her that of Sir Thomas and lady Broughton, follow of courſe. The teſtator's brother John Wicker, whom the appellant Mrs. Wicker repreſents, was the *reſiduary deviſee* and *legatee*, and alſo executor of the teſtator; and conſequently ſhe is the perſon to whom the fund in queſtion belongs, till it can be ſhewn from the will, that the reſpondent or ſome other perſon has a better title. This ſeems no ſmall advantage to the appellants: becauſe in the firſt inſtance it throws the *onus* of making out a claim entirely on the reſpondent, and conſequently the title muſt remain with the appellants, if the

William Wicker, ſubject to the two annuities charged upon that fund by his will, and praying to have ſuch right declared.

The appellants, by their anſwer to this new bill, ſubmitted to the court, whether the reſpondent was entitled to *any* and *what* ſhare of the ſaid ſurplus money from the real and perſonal eſtate of the teſtator William Wicker; they having been adviſed, that *at the utmoſt* it was not the intention of his will to give more than a *moiety* of ſuch ſurplus to the ſecond ſons of his ſiſter Sarah Mitford; and that the teſtator's brother John Wicker was, as reſiduary deviſee and legatee of William Wicker, intitled to the whole of his real and perſonal eſtate, not otherwiſe diſpoſed of by his will.

On the 13th of March 1780, the cauſe was heard before lord chancellor Thurlow, who was of opinion, that the reſpondent was entitled to the *whole* of the ſaid ſurplus money, and made a decree in favour of the reſpondent accordingly.

The appellants afterwards obtained an order for re-hearing of the cauſe; but on the 21ſt of May 1781, when the re-hearing came on, the decree was affirmed.

From this decree Mrs. Wicker and Sir Thomas and lady Broughton appealed to the houſe of lords.

The appeal was heard before the lords in June 1782, and the following argument was delivered by the editor from written notes as junior counſel for the appellants.

The reſult was againſt the appellants, the lords affirming the decree complained of.

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conſtruction of the deviſe the reſpondent relies on is ſo difficult, that the judgment of thoſe who are to interpret it is arreſted by doubt, and cannot be convinced that the intention of the teſtator and the rule of law in reſpect to executory deviſes are both with the reſpondent.

In order to ſee whether the reſpondent can make good his claim, I, on the part of the appellants, beg leave to conſider it in three points of view.

FIRST, I will conſider, whether the *executory deviſes* on the contingency of the teſtator's *dying without iſſue*, as well thoſe ſubſequent to the deviſe to the younger ſons of teſtator's brother and ſiſter as that deviſe itſelf, are or are not good within the rule of law by which all executory deviſes are governed.

SECONDLY, I will conſider, whether, tho' the executory deviſes ſhould not be had for remoteneſs, the particular executory deviſe to the younger ſons of teſtator's brother and ſiſter is not ſo expreſſed, as not to operate in the event which has really happened, namely, there being *no younger ſon of the teſtator's brother*, but *a younger ſon of his ſiſter only*.

THIRDLY, I will conſider, whether, tho' the executory deviſe to the younger ſons of teſtator's brother and ſiſter be good in law, and alſo be admitted to have taken effect, it will operate *per ſtirpes*, that is, by giving one moiety to the younger ſons of his ſiſter, and the other to the brother's younger ſons, or *per capita*, that is, by giving the whole amongſt the younger children of both without diſcrimination.

If the firſt of theſe queſtions is with the appellants, they are entitled to the *whole* of the fund in diſpute; becauſe the deviſes to the teſtator's own children, failing from his never having had iſſue, and the deviſes on the contingency of his dying without iſſue being void, it is the ſame as if both ſets of deviſes were out of the will; in which caſe there is no diſpoſition of the ſurplus of the teſtator's eſtate, except by the reſiduary deviſe to the teſtator's brother, whom the appellants repreſent. But though the firſt queſtion ſhould be for the reſpondent, ſtill if the ſecond is againſt him, the appellants will notwithſtanding be entitled to a moiety of the ſurplus; for then the ſurplus by the terms of the will is made diviſible in moieties between the teſtator's brother and ſiſter or their reſpective repreſentatives, and the appellant Mrs. Wicker, as executrix of the former, is entitled to his moiety. What, according to that conſtruction, would become of the moiety of the teſtator's ſiſter doth not appear by the pleadings, it not being ſtated who is her perſonal repreſentative; and conſequently it remains to be proved whether the reſpondent has any intereſt in it or not. Though too both the firſt and ſecond of the three queſtions ſhould be decided againſt the appellant, ſtill the appellant Mrs. Wicker would be entitled to a moiety of the

ſurplus

ſurplus in diſpute if ſhe prevails in the laſt queſtion; becauſe if the deviſe to the younger ſons of teſtator's brother and ſiſter operates *per ſtirpes*, then there being no younger ſon of the brother to take the moiety allotted to his younger ſons, it falls into the reſidue of the teſtator's eſtate, and conſequently belongs to the appellant Mrs. Wicker as executrix of Mr. John Wicker the reſiduary legatee.

First Question.

When executory deviſes were firſt permitted, it was foreſeen, that entails made in that form could not be barred by fines or recoveries.—If they were of *real* eſtate, the extraordinary deviſee could not be barred by fine; becauſe the title of the executory deviſee is not *through*, or as *privy* to the immediate taker, but quite independent of him: nor could the executory deviſee be affected by a recovery, it being ſoon ſettled, that the recompence, which in the ſuppoſition of law is the ground of barring the iſſue in tail and thoſe in remainder and reverſion, doth not extend to an executory deviſee (*a*).—If they were of *perſonal* eſtate, whether chattels real or perſonal, from the nature of the property they could not be the ſubject of either fine or recovery.

Entails by executory deviſe being thus exempt from any legal mode of barring them, it became neceſſary to preſcribe bounds and limits to this new ſpecies of ſettlement, leſt otherwiſe entails ſhould obtain a longer duration through the irregular and barely permitted medium of executory deviſe, than the law endures, where the entail commences in the regular way, by creating eſtates for life and eſtates tail with remainders over.

Hence originated the rule both at law and in equity, that the contingency, on which executory deviſes depend, ſhould be confined to a ſtated period; and by analogy to the caſe of ſtrict entails, which cannot be protected from fines and recoveries longer than the life of the tenant for life in poſſeſſion, and the attainment of 21 by the firſt iſſue in tail, it was at length ſettled, that the longeſt period for veſting of an executory deviſe ſhould be *any life or lives in being and* 21 *years after*; to which may be added *a few months more for the caſe of a poſthumous child.* Therefore every contingency, which is not ſuch, that if it ever happens, it muſt neceſſarily be within the period ſo deſcribed, is too remote for an executory deviſe.

The conſequence of thus circumſcribing the limits of an executory deviſe is, that it is not lawful to limit an executory deviſe on a *general and indefinite failure of iſſue*; namely, a failure of iſſue of the perſon named whenever it happens, be the time of the event ever ſo diſtant. It is equally a conſequence of the rule,

(*a*) Pell v. Brown, Cro. Jam. 590. Pig. on Recov. 129.

that

that if the failure of iſſue is reſtrained to the death of any perſon or perſons actually living, or to any period not beyond a life and lives in being and 21 years with a few months beyond, then the contingency is good, and the executory deviſe has its full effect. Perhaps if the doctrine of executory deviſes was *res integra*, and was now to be ſettled, it might be thought a ſufficient and more juſt check of them to hold, that they ſhould be good as far as the given period, whether the contingency was too largely and widely expreſſed or not. But our anceſtors have not left us a choice; it having been long a fixed rule, that, if the contingency is too remote, the executory deviſe dependant upon it ſhall not be merely void ſo far as it exceeds the line preſcribed, but ſhall wholly fail.

According to this way of conſidering the rule as to executory deviſes, the validity of the deviſe in the preſent caſe, which is to *the younger ſons of the teſtator's brother and ſiſter*, if the teſtator ſhould *die without iſſue*, depends ſimply on this conſideration: whether by the intention of the will the teſtator's *dying without iſſue* is the contingency of *failure of iſſue whenever it ſhould happen*; or whether it was merely a *failure of iſſue at the time of the teſtator's death*. If the will points at a failure of iſſue in the former and *large* ſenſe of the words, the reſpondent's counſel will be under difficulties how to contend, that the executory deviſe can be ſupported. If the will points at a failure of iſſue in the latter and reſtricted ſenſe of the words, the appellants muſt yield to the reſpondent, that it is a good executory deviſe. It is therefore my buſineſs, as counſel for the appellants, to argue for the large ſenſe of the words *dying without iſſue*.

Now I conceive it to be a ſettled conſtruction, that the words *dying without iſſue* do properly and in themſelves refer to a *general and indefinite failure*, and that every executory deviſe limited to take effect on ſuch words is void in law, and cannot take effect, unleſs the will contains other words, from which it appears, that the teſtator did not uſe the words *dying without iſſue* in their proper legal genuine and full ſenſe, but intended to reſtrain them *to a failure of iſſue at the time either of his own death, or of the death of ſome other perſon or perſons exiſting at the time of his will*. This doctrine ſeems perfectly ſettled by the caſe of *Beauclerk* and *Dormer*, which was determined by lord chancellor Hardwicke in 1742, and is reported in 2 Atkyns 308. Before this latter caſe the language of the courts in ſome former deciſions might leave room for contending, that the words *dying without iſſue*, in a *vulgar* and *ordinary* ſenſe, imported a failure of iſſue *at the time of the death of the perſon from whom the iſſue was to come*, and that in a will this

vulgar

vulgar ſenſe ought to prevail againſt the *proper* and *technical* one: but this idea was rejected by lord Hardwicke in the caſe of *Beauclerk* and *Dormer*, and the rule has been ever ſince as is before ſtated.

If this be ſo, the limitations over in the will in queſtion on the event of the teſtator's *dying without iſſue*, being decided upon by thoſe words ſeparately and diſtinctly, and without reference to the other parts of the will, muſt fall to the ground as executory deviſes on too remote a contingency.

The firſt and preſumptive conſtruction of the words *dying without iſſue* being then with the appellants, it is incumbent on the reſpondent to point out ſome other paſſage of the will, from which it may be fairly and clearly collected, that the teſtator applied the words in a ſenſe different from their legal and proper import.

Accordingly it may be argued for the reſpondent, that the will doth contain expreſſions and proviſions ſufficiently ſpecial to controul the legal and preſumptive ſenſe of the words *dying without iſſue*, and to reſtrain them to a failure *at the teſtator's death*.

With this view, the counſel for the reſpondent may perhaps refer to the uſe of the word *leave* in the deviſes to teſtator's own ſons and daughters. There are four inſtances in which the teſtator uſes the word *leave* in regulating the diſtribution amongſt his own children. 1. It is expreſſed in the will, that if the teſtator ſhould *leave* but one ſon and one daughter, then ſuch ſon ſhould have 4000l. and the daughter 2000l. 2. If teſtator ſhould *leave* two or more ſons and no daughter, then he gives the whole of his ſubſtance to be equally divided between them. 3. If he ſhould *leave* no ſon but one or more daughter or daughters, he gives the whole of his ſubſtance between them, if more than one; and if but one, to ſuch daughter only. 4. If he ſhould *leave* two or more ſons, and one or more daughter or daughters, then he gives 4000l. between the former, and 2000l. between the latter. From this uſe of the word *leave*, eſpecially ſuch frequent uſe of it, the reſpondent's counſel may inſiſt, that in expreſſing the deviſes over on the contingency of the teſtator's *dying without iſſue*, he meant *dying without leaving iſſue*; and that this, being the ſame as *failure of iſſue at the time of his death*, will clearly bring the executory deviſe in queſtion within the compaſs of the limits preſcribed to ſuch deviſes.

If ſuch an argument ſhould be advanced for the reſpondent, it may be thus anſwered.

That a *dying without leaving iſſue* has been conſtrued in wills to mean a failure of iſſue at *the death of the perſon named*, I do not deny; nor do I altogether oppoſe the caſes in which ſuch a conſtruction

ſtuction has prevailed. But I conceive the conſtruction to be inapplicable here. 1. So narrowing the contingency would have tended to create a doubt, whether thereby the teſtator's poſthumous children, if there had been any, would not have been excluded, and ſo his brother's and ſiſter's children would have been preferred to his own iſſue; which would be not only attributing an unnatural intention to the teſtator, but alſo one little conſiſtent with another part of the will, where the teſtator, in naming guardians for his children, expreſsly extends the proviſion to a poſthumous child. However, I do not much inſiſt on this obſervation, becauſe, as in Willis v. Hodgſon, in 2 Atk. 115. lord Hardwicke held a poſthumous child entitled to take within the ſtatute of diſtributions; ſo perhaps a like-extended conſtruction might be thought equally applicable to a deviſe, more eſpecially as in the preſent caſe the teſtator, when diſpoſing of the guardianſhip of his children, includes any child his wife might be *enſeint* with at his deceaſe. 2. If the teſtator had died leaving no ſon or daughter, but only a *grandchild*, to conſtrue *dying without iſſue*, to mean *without leaving a ſon or daughter*, would alſo be preferring his brother's and ſiſter's children to his own iſſue, which would be equally unnatural. 3. It appears from the firſt part of the deviſe in favour of the teſtator's children, that he is not uniform in the uſe of the word *leave* even with reſpect to them. He begins with ſuppoſing the caſe of only one ſon and child; and in this inſtance he uſes the word *have* inſtead of *leave*, the expreſſion of the will being, *in caſe I ſhould* HAVE *one only ſon and no other child, then I give ſuch only ſon the whole of my fortune.* 4. Where the teſtator intended to limit a contingency to the particular time of his own deceaſe, the will ſhews, that he knew what was the unequivocal language proper to explain his meaning. Thus on the event of his dying without iſſue, and in caſe of his ſiſter Mitford's not having a younger ſon, the teſtator gives the one-half of his fortune to William Wicker his ſiſter's eldeſt ſon; adding, *if he ſhould be living at the time of my deceaſe.* Again in the clauſe about the guardianſhip of his children, the teſtator twice repeats the expreſſion *at the time of my deceaſe.* It is alſo very obſervable, that in ſeveral parts of the will he couples *leave* with the words *at the time of my deceaſe*; namely, *twice* in the condition annexed to the annuity to his wife, and once in the clauſe of guardianſhip: whence it ſeems, that the word *leave* in his ſenſe of it did not refer *to the time of his deceaſe*, and therefore that he added other more ſpecial words where that was his meaning. 5. The teſtator has omitted the word *leave* in the executory deviſe on which the preſent caſe ariſes; for the words are, *in caſe it ſhall happen that I ſhould die without iſſue.* On what ground then can it

it be ſaid that the teſtator meant to expreſs the ſame thing, where his words are ſo wholly different? Surely it is a dangerous conſtruction to imply, that, becauſe in one ſort of proviſion he has uſed the word *leave*, or has expreſsly referred *to the time of his deceaſe*, therefore in another ſort of proviſion, where he changes his language and omits ſuch reſtrictive words, ſtill his meaning is of the ſame reſtrictive kind! The direct contrary ſeems to be the true conſtruction. In the preſent caſe it is particularly ſo; becauſe it was natural, from the affection of the teſtator for his own iſſue, whether children, grandchildren, or in whatever degree, that, in deſcribing the event on which his collateral relations were to ſucceed to his property, he ſhould intend to point at a failure of iſſue in the largeſt ſenſe of the words. As too the whole texture of the will is an evidence, that the teſtator was neither acquainted himſelf with the nice and profound doctrine of executory deviſes, nor aſſiſted by any profeſſional perſon poſſeſſed of ſuch knowledge, it is eaſy to believe that he was ignorant, that there was any thing contrary to law in a deviſe over on the contingency of a *general* failure of iſſue. What alſo confirms this idea is, that, when he comes to give amongſt collaterals, he drops the words *ſons* and *daughters*, and in the place of them drops the more comprehenſive word *iſſue*, deviſing over on failure of his *iſſue*, not on failure of his *ſons* and *daughters*. Nor ſhould it be forgotten, that, in this difference of language in the deviſes to his own children and in thoſe to his collateral relations, he is quite uniform. As where it was firſt neceſſary to introduce proviſions to the collateral branches of his family, he uſes the words *dying without iſſue*, which is in the deviſe to the younger ſons of his brother and ſiſter; ſo in a ſubſequent part, where he takes occaſion to let in the elder ſon of his ſiſter, if he ſhould have no younger ſon, he uſes preciſely the ſame words; and what renders this more ſtriking is, that the words *dying without iſſue* are not uſed in any other part of the will.

The reſult of all this being conſidered is, that the words *dying without iſſue* not only properly and legally mean a failure of iſſue *whenever it ſhall happen*; but the ſeveral parts of the will in queſtion ſeem to operate in favour of this large ſenſe of the words, inſtead of furniſhing any grounds for a more reſtrictive one. Conſequently the appellants think it warrantable to inſiſt, that the only terms on which the words can be reſtrained are, that becauſe the teſtator intended *more* than the law permits, therefore his words ſhall be conſtrued to mean *leſs* than they import either in law or in the teſtator's apprehenſion, leſt otherwiſe his will ſhould be diſappointed; which would be a latitude of conſtruction, ſuch as has never yet been profeſſedly adopted by any court of this country.

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Probably, however, it may be attempted to argue for reſtraining the words *dying without iſſue* to the teſtator's death, that, in the deviſe over to the younger ſons of his ſiſter, immediately after theſe words there follows the word *then*; and it may be ſaid, that *then* being an adverb of time, refers to the time of the teſtator's deceaſe, and therefore that the *failure of iſſue* ſhould be ſo referred alſo.

But there is little ground for ſo conſtruing the word *then*. In ſtrictneſs it moſt properly refers to the time of the *failure of iſſue*. At all events, the word is too equivocal and ambiguous to warrant applying it to the time of the teſtator's deceaſe, without any thing more; and on this principle Lord Hardwicke in *Beauclerk* and *Dormer*, already cited, did accordingly refuſe to conſtrue the word *then* in this latter ſenſe, which is therefore a direct authority in point for the appellants.

It may alſo be ſaid, that the caſe of *Atkinſon* and *Hutchinſon*, in 3 P. Wms. 258. is an authority for reſtraining the words *dying without iſſue* to a failure of iſſue *at the time of the teſtator's deceaſe*; becauſe that caſe was determined by Lord Chancellor Talbot, on the word *leave*, in a deviſe *preceding* the executory deviſe then in queſtion.

If the caſe of *Atkinſon* v. *Hutchinſon* was as it is abridged in the margin of the Reporter, or as it is ſtated by Mr. Tracy Atkyns, in a note referring to the report in Peere Williams, there would be ſome colour for calling it in aid of the reſpondent. But the ſtatement of the will in the report itſelf renders the caſe wholly inapplicable here. As that caſe is given in Mr. Atkyns and in the margin of Peere Williams's Reports, it was thus. "A deviſe of a term to *A.* for life, remainder to the children *A.* ſhall leave at his death, and if the children of *A. die without iſſue*, then to *B.* The children of *A* die without leaving any iſſue living at the time of their deaths;" and on this caſe Lord Talbot is repreſented to have held the deviſe over to *B.* good. But this abridged ſtate of the caſe appears *materially erroneous* from the very report, which is profeſſed to be abridged. According to the real facts of the caſe, Edward Baxter deviſed a term of years "in truſt for his wife Sarah, if ſhe ſo long continued a widow, "and after her death or ſecond marriage, to the uſe of ſuch "children as the teſtator ſhould *leave* at the time of his death, "equally amongſt them; and in caſe any of his ſaid children "ſhould die *without leaving any iſſue*, the ſhare of him or her ſo "dying to go to the ſurvivors or ſurvivor of them; and in caſe "all his ſaid children ſhould die without LEAVING *any iſſue*, "then to the uſe of John Hutchinſon."—It is a great and eſſential difference between the *abridged* and the *full* ſtate of this caſe,

caſe, that in the former the executory deviſe over to the perſon in the laſt limitation is on the contingency, if the children ſhould *die without iſſue*; whereas in the latter, which muſt be taken to be the true report, it was on the contingency, if the children ſhould *die without* LEAVING *iſſue*. Had therefore the executory deviſe in the preſent caſe been on the teſtator's *dying without* LEAVING *iſſue*, the deviſe, which was the ſubject of debate in *Atkinſon* and *Hutchinſon*, might have reſembled it. But the word *leaving*, which was ſo material *there*, being wanted *here*, all compariſon between the two caſes falls to the ground.

It may be contended for the reſpondent, that the contingency of the teſtator's *dying without iſſue*, in the preſent caſe, has a *double* ASPECT, including in it two diſtinct parts, one a failure of iſſue by the teſtator's *never having any*, the other a failure of iſſue *after iſſue had*; and that the former part of the contingency, which is lawful, and what has really happened, ought to be ſeparated from the latter, in conſequence of which the former certainly would be good. Alſo for this purpoſe, ſeveral authorities may be cited; particularly Higgins and Dowler, in 2 P. Williams, 1 Salk. and 2 Vern. by Lord Cowper; *Stanley* v. *Leigh*, in 2 P. Wms. by Sir Joſeph Jekyll; *Sabbarton* v. *Sabbarton* in Mr. Forreſter's Reports, as decided by the judges to whom lord Hardwicke referred the caſe; *Gower* v. *Groſvenor*, in Barnadiſt. Cha. Rep. by lord Hardwicke; and *Pelham* v. *Gregory*, in 1760, by your lordſhips, after taking the opinion of the judges. From theſe caſes combined, the inference by the counſel for the reſpondent may be, that they have fully eſtabliſhed a difference, between an executory deviſe on a failure of iſſue after a preceding *veſted* eſtate to the iſſue of a tenant for life, and an executory deviſe on ſuch failure of iſſue after a preceding *contingent eſtate* to them; and that, if in the latter caſe the eſtate's veſting by the birth of a child or children is made to depend on the life of a perſon *in eſſe*, and the veſting becomes impoſſible by the death of that perſon without ever having had any child, then the executory deviſe is good. Further, they may urge, that this difference exactly applies to the preſent caſe; becauſe here, as the teſtator had no child living at the time of his will, the eſtate given to his children previous to the deviſes over on his dying without iſſue was *contingent*, and as he never had any child, the deviſe to them never veſted, nor can veſt.

But to the application of ſuch a refinement to the preſent caſe, the appellants have various conſiderations to oppoſe.

1. In any caſe ſuch ſplitting of *one* contingency into *two* ſeems to have little reference to the real intent of a teſtator. It rejects the ſimple form in which the teſtator expreſſes the contingency, and

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ſubſtitutes for it another, better adapted indeed to execute the purpoſe of his will, but unfortunately ſuch as never occurred to the teſtator himſelf. Probably, therefore, this new modelling owes its birth to an artificial ſubtlety, of which the aim might be to obviate, in ſome degree, the inconvenience from a rule of conſtruction, already noticed, and too well eſtabliſhed in the early period of executory deviſes to be openly ſubverted; namely, the rule, that, if the contingency be too large, the deviſe ſhall be *wholly* void, inſtead of being received *partially*, and *ſo far as it doth not exceed the policy* of the law againſt perpetuities.

2. If this ſplitting of one contingency into two is warrantable, it ought not to be confined to executory deviſes on failure of iſſue, after a preceding unveſted eſtate to them, but ſhould operate univerſally, whenever an executory deviſe is made on failure of iſſue of a perſon *in eſſe* not having iſſue at the time of the deviſe; becauſe, in every ſuch caſe, the contingency is equally capable of being ſo divided, it implying, as well a failure of iſſue by never having any, as having iſſue and a failure afterwards. But the very reſpectable approvers of this ſplitting doctrine refuſe ſo to apply it. Thus in *Beaucl[illegible]* and *Dormer*, 2 Atk. 308. where one made Miſs Dormer his ſole heir and *executrix*, *but if ſhe died without iſſue, then to go to lord George Beaucl[illegible]*, lord Hardwicke held the deviſe over wholly void, without regard to Miſs Dormer's ever having iſſue or not. It ſeems, therefore, as if the principle of the doctrine leads to conſequences, which thoſe that adopt it feel themſelves not at liberty to acquieſce in.

3. In all the caſes before cited, except *Higgins* and *Dowler*, the doctrine was taken on a difference between an executory deviſe after what in the caſe of land would be an *expreſs veſted* eſtate *tail*, and an executory deviſe after what in the caſe of like property would be an *expreſs contingent* eſtate *tail*; whereas the preſent caſe is not of an eſtate tail of *either* ſort.

4. In all the caſes before mentioned, without excepting one, there was a previous eſtate *for life*, with a remainder in tail; but in the preſent caſe the firſt *deviſe* is *not* merely *for life*, the will giving to the teſtator's children an eſtate in general terms, which, if it was not for the controul from the deviſe over on his dying without iſſue, would have carried an abſolute intereſt in the perſonal property deviſed.

5. Lord chancellor Nottingham, to whoſe liberality of conſtruction the preſent doctrine of executory deviſes owes ſo much of its eſtabliſhment, did, in *Burgeſs* v. *Burgeſs*, Pollexfen 40, refuſe to adopt this diſtinction between an executory deviſe on a failure of iſſue after a *contingent* eſtate, and an executory deviſe on ſuch failure after a *veſted* eſtate.

6. Lord

6. Lord Talbot decided againſt the diſtinction in *Clare* v. *Clare* in Mr. Forreſter's Reports, and again in *Sabbarton* v. *Sabbarton* in the ſame book; and though his opinion was afterwards over-ruled in the latter caſe by the judges to whom lord Hardwicke referred it, yet from the terms of their certificate it appears, that they founded themſelves, not on the diſtinction in queſtion, but on the uſe of the word *leave*, in the executory deviſe over.

7. Lord Hardwicke, in *Gower* v. *Groſvenor*, did not chuſe abſolutely to found his opinion on the diſtinction, but chiefly relied on the ſpecial manner of giving the perſonalty by reference to a ſtrict intail of real *eſtate*, the former being deviſed to go as *heir-looms, as far as they could by law*; which qualification of the executory deviſe left the caſe without a doubt.

8. In *Pelham* v. *Gregory*, the deviſe was of *real* and *perſonal* eſtate *mixed*; and therefore the judges, in that caſe, might imply the qualification expreſſed by the will in *Gower* and *Groſvenor*.

9thly and laſtly, the caſe of the *Earl of Chatham* againſt *Dawe*, is directly in the teeth of the diſtinction; and being a determination of your lordſhips, grounded on the unanimous opinion of the judges, and ſubſequent to every other caſe, ought to prevail. The caſe of the *Earl of Chatham* and *Mr. Dawe* was in ſubſtance this: It was a deviſe of the dividends of ſome bank-ſtock, and of the yearly income of ſome exchequer annuities, and alſo of ſome freehold and leaſehold eſtates, and of the uſe of ſome furniture, to Miſs Pynſent *during her life*, and after her deceaſe to the male *heirs of her body for ever* lawfully begotten, and *for want of ſuch iſſue* unto William Dawe Tothill for life, with various limitations over. Miſs Pynſent died without having had iſſue; on which it became a queſtion, whether the executory deviſe to Mr. Dawe Tothill of the leaſehold and other perſonalty, on default of iſſue male of Miſs Pynſent, was good or not; and Mr. Tothill brought a bill to try this queſtion. The cauſe was firſt heard in June 1766, before the preſent maſter of the rolls, who held the deviſe to Mr. Dawe Tothill bad, as being on too remote a contingency, and therefore diſmiſſed Mr. Dawe Tothill's bill. In June 1770, the cauſe was reheard before the lords commiſſioners of the great ſeal, who reverſed the decree of the maſter of the rolls. Lord Chatham appealed to your lordſhips, before whom it was heard in April 1771. After hearing of the counſel, the following queſtion was put to the judges on the motion of lord Manſfield, viz. *Whether* IN THE EVENT THAT HAS HAPPENED *the deviſe to the reſpondent William Dawe Tothill, of the bank-ſtock, exchequer orders, leaſehold eſtates, and furniture of the houſes, ſpecifically bequeathed, is good and effectual or void?* After a conſideration of ſome

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days Sir Thomas Parker, then lord chief baron of the exchequer, delivered it as the *unanimous* opinion of the judges, that *the deviſe was void*; on which the houſe reverſed the decree of the lords commiſſioners. What renders this judgment of the lords a complete anſwer to all the caſes, which can be cited, to ſuſtain the diſtinction between an executory deviſe on failure of iſſue after a *contingent* eſtate tail, and an executory deviſe on ſuch failure after a *veſted* one, is the particular manner, in which lord chief baron Parker explained the grounds of the anſwer of the judges to the queſtion propoſed. At the bar great pains were taken on the ſide of lord Chatham, to make *heirs male of Miſs Pynſent's body* words of *limitation*, and on the part of Mr. Tothill to make them words of *purchaſe*; as if the limitation over to Mr. Tothill chiefly turned on a diſtinction between an executory deviſe on a *veſted* and one on a *contingent* eſtate tail; and the words IN THE EVENT THAT HAS HAPPENED, in the queſtion propoſed to the judges, manifeſtly points at the event of Miſs Pynſent's dying without *ever having had iſſue*, and conſequently at ſuch diſtinction. But it was underſtood at the time, that, when the judges conferred on the caſe, they differed in opinion on the operation of *heirs male of Miſs Pynſent's body*; ſome holding them words of *purchaſe*, others holding them words of *limitation*; and that in conſequence of this it became neceſſary to conſider, whether the caſe could not be diſpoſed of without deciding which way thoſe words ſhould operate. Accordingly the lord chief baron, in delivering the opinion of the judges, declared it to be their unaminous ſenſe, that the deviſe over to Mr. Dawe Tothill *on failure of iſſue male of Miſs Pynſent's body* was void, on account of *the indefinite failure of iſſue*, to which thoſe words referred. He added, by way of explanation, that on the one hand, if *heirs male of Miſs Pynſent's body* were conſtrued words of *limitation*, the deviſe was void, becauſe it was after a *veſted* eſtate tail; and that on the other hand, if *heirs male of her body* were words of *purchaſe*, the deviſe over was ſtill void, becauſe it was on an *indefinite failure of iſſue*. Leſt too there ſhould be any doubt of the grounds on which the judges condemned the deviſe over to Mr. Dawe Tothill, the lord chief baron particularly cited the before-mentioned caſe of *Clare* and *Clare*, in which a term was deviſed to *A.* for life, and after his death to his *iſſue male*, and when that ſhould be extinct to *B.*; and that lord Talbot in that caſe held, *firſt*, that *iſſue male* were words of *purchaſe*, and *A.* took only for life; and *ſecondly*, that as teſtator had deviſed over on a general failure of iſſue male of *A.* the deviſe was void, *notwithſtanding the accident of A's dying without having had iſſue male*. Taking into conſideration theſe

particulars which attended the cafe of the earl of Chatham and Mr. Dawe Tothill, I fubmit to your lordfhips, that, as *Clare* and *Clare* was determined by lord Talbot in the moft direct contradiction of the diftinction between an executory devife on a general failure of iffue, where it follows a *contingent* eftate, and where it follows a *veſted* one; fo the lords, in the *earl of Chatham* and *Dawe*, have equally rejected that diftinction, and conſequently have fubverted all the cafes which clafh with *Clare* and *Clare*, and are in favour of it. On this ground, therefore, I fubmit to your lordfhips, that the diftinction, however fortified by authority it might once be, however cogent the reafons on which it proceeded, is now expired, and cannot be applicable either to the preſent or any other caſe.

There is one other remark, which ſtrikes me as likely to be made for the reſpondent, on thus attempting to condemn the executory deviſes over in the preſent caſe *on the teſtator's dying without iſſue*. It is, that though the teſtator, whoſe will is in queſtion, has been now dead above thirty years; and that though there have been two cafes in chancery to ſettle the conſtruction, and though the preſent cauſe was twice heard before the preſent lord chancellor, yet the validity of the deviſe, under which the reſpondent claims, was never before ſo much as called in queſtion.

In anſwering this obſervation, if it ſhould be made, the appellants cannot deny the facts it repreſents. I will alſo admit it to be ſingular, that if the point is maintainable, it ſhould ſo long eſcape the attention of the appellants and thoſe concerned for them. Further, I concede that as the point is ſtarted in ſo very late a ſtage of the cauſe, it behoves your lordſhips to be jealous of entertaining the point, and this may render it the more difficult to convince your lordſhips, that it has ſtrength enough to warrant a deciſion for the appellants. But notwithſtanding, if, on an examination of the terms of the will, it appears that the point doth fairly ariſe, and that the appellants are not precluded by any conceſſion they have made in the pleadings, I preſume, that in point of form the queſtion is ſtill open to diſcuſſion, and that a deciſion upon it cannot be declined. If, too, the arguments on which the invalidity of the executory deviſe in queſtion is now urged to your lordſhips, ſhould, in conſidering them, be found too ſtrong to be repelled, the lateneſs of their appearance cannot operate as a bar to their effect and influence on the judgment of your lordſhips. Indeed, on the one hand, this lateneſs gives the reſpondent the great advantage of a *firſt* prejudice againſt the point. But then, on the other hand, it removes for the appellants, that, which, on the ſubſequent points of the caſe, they feel to be their greateſt diſ-

advantage;

advantage; namely, the more formidable and permanent prejudice from the higher authority of the adjudication which gives occaſion to the preſent appeal; for the objection to the contingency of the executory deviſes now controverted never having been argued or ſpoken to in any reſpect before the court below, it was no part of the caſe on which the judge of that court pronounced his opinion, and conſequently it comes before your lordſhips unaffected and untouched by the grounds of the decree appealed from.

SECOND QUESTION.

The argument on this queſtion lies in a narrower compaſs than that on the former. It ariſes from the particular manner in which the teſtator has expreſſed the deviſes ſubſequent to the deviſe to the *younger ſons of his brother and ſiſter*. Had the latter ſtood unexplained and uncontrouled by the other parts of the will, there might be no room for ſuch a queſtion. But there are two other paſſages in the will, from which the appellants collect, that the teſtator did not mean that the deviſe to the ſecond or younger ſons of his brother and ſiſter ſhould take effect, unleſs *both* of them had ſuch iſſue as falls within that deſcription.

The firſt of theſe paſſages immediately follows the deviſe to the younger ſons; the words being, *if my ſaid ſiſter* AND *brother ſhall not have any ſuch ſecond or younger ſon, then, and in ſuch caſe, I do give and bequeath my ſaid fortune or ſubſtance to my ſaid brother Wicker and ſiſter Mitford, equally to be divided between them, ſhare and ſhare alike, and to their reſpective executors and adminiſtrators:* Now the appellants apprehend, that this deviſe over, according to ſtrict conſtruction, is ſo expreſſed as to ſhew, that unleſs *both* the brother and ſiſter had a ſecond or younger ſon, *the parents themſelves*, and not their children, were to take. The ſtrict conſtruction is certainly with this idea; for the brother and ſiſter are named not in the *diſjunctive* but *conjunctively*, the word AND being interpoſed inſtead of OR. If the word *both* had been added, and the contingency had been *if my ſiſter and brother ſhall not* BOTH *have any ſuch younger ſon*, it could not be doubted, but that the teſtator intended that if *either* ſhould not have a younger ſon, the preceding deviſe to younger ſons ſhould not operate in any reſpect. And though, from the want of that expreſſion, the conſtruction contended for is not quite ſo ſtrong; yet as the word AND by itſelf operates conjunctively as well as BOTH, it ſhould be underſtood accordingly, unleſs from ſome other part of the will it can be ſhewn, that the teſtator meant to ſpeak in the *diſjunctive:*

The second passage, which the appellants rely upon, is a subsequent part of the will, where the testator has thought fit to introduce a special provision for the event of his sister's not having a younger son. The words are, *in case I shall dye without issue, and my sister Sarah Mitford shall not have any second or younger son born of her body, then and in such case I do give and bequeath one half of my fortune or substance to Wm. Mitford, eldest son of my said sister Mitford, if he shall be living at the time of my decease; but in case of his death and of the death of my said sister before me, then and in such case I give the* WHOLE *thereof unto my said brother Wicker and his executors or administrators.* Here the testator gives his own interpretation of the former part of his will: for he seems to have recollected, that under that the event of his sister's not having a younger son would carry his property in moieties to his brother and sister; but on further consideration he appears to have changed his mind in respect to one moiety. Instead of giving a moiety to his sister, as he thought he had done, by the previous devise to his sister and brother and their respective executors on the event of there not being younger sons of *both*, he makes a new arrangement of this moiety. *First*, he gives it to his sister's eldest son, who was then living; and *secondly*, if both he and his mother should die before the testator, then he gives it to his brother; and as he conceived, that in the event of his sister's not having a younger son the devise to the younger sons of his brother was not to operate, but that his brother by the former part of the will would in that event be entitled to one moiety, the testator expressed his new intent in favour of his brother, not simply by adding the sister's moiety to his own moiety, but by declaring that in the event described he should have the *whole*. This was the same in effect, as if he had thus expressed himself.—"By the previous devise to "my brother and sister and their respective executors and ad- "ministrators, my brother will be entitled to a moiety of my "property, if there is not a younger son of my sister, or if there "is not a younger son of my brother; and my sister will be "entitled to the other moiety. But on reconsidering this my "first plan of distribution, I chuse to make an alteration in re- "spect to *one* moiety; and my will is, that if my sister shall not "have a younger son, the moiety she would be entitled to under "my first idea shall not go to her absolutely, but it shall go to "her or others according to certain events, *viz.* if her eldest son "survives me, it shall go to him, if he dies before me and she "survives me, it shall go to her; but if I survive both, it shall "go to my brother; and as I have already given one moiety to "him in the event of there not being a younger son of him and

"my

" my ſiſter, the acceſſion of this other moiety will centre the " *whole* in him, and accordingly my will is that he ſhall have " the *whole*."

Upon this view of the ſecond queſtion, it reſolves itſelf into this ſingle conſideration.—The ſtrict conſtruction of the words, by which the teſtator deviſes his property in the firſt part of his will to the younger ſons of his ſiſter and brother, excludes the younger ſons of *both*, unleſs *both* have children of that deſcription. There is not a ſyllable in any other part of his will which tends to contradict this conſtruction. On the contrary, the only other part which throws any light on the teſtator's meaning, confirms it; the latter part of the will containing an expreſs proviſion, that if his ſiſter ſhall not have a younger ſon, the younger ſon of his brother ſhall not have any eſtate whatever. The teſtator having then expreſsly declared, that if his ſiſter ſhall not have a younger ſon, the younger ſon of the brother ſhall not take; how natural was it, that the teſtator ſhould alſo mean, on the other hand, that the younger ſon of his ſiſter ſhould not take if his brother ſhould not alſo have a younger ſon! If too the words of the former part of the will do in ſtrict conſtruction import ſuch a meaning, on what ground can your lordſhips, whoſe office it is to interpret the will, impute to the teſtator a contrary intention?

It may be objected, that this conſtruction attributes to the teſtator a ſtrange and improbable meaning; for why ſhould the event of his ſiſter's not having a younger ſon diſappoint his brother's younger ſons, or *vice verſâ* the brother's not having a younger ſon diſappoint the younger ſons of the ſiſter?

That ſuch a meaning is *particular*, it is not requiſite for me to deny. But if ſuch an intent is expreſſed, or by fair conſtruction is to be inferred from the will, it muſt prevail. Every lawful intent of a teſtator, however odd, however unaccountable, nay, however harſh or unnatural, if his words are ſufficient to convey it, and it is not contrary to law, is entitled to have its full effect.—Beſides, in the preſent caſe ſuch an intent as is here contended for, though it be particular, yet that is all which can be ſaid of it. All it amounts to is giving to the younger ſons of two brothers or ſiſters, if *both* ſhould have younger ſons, but to the *parents themſelves if only one* ſhould have children of ſuch a deſcription; and it may be accounted for by the equality of the teſtator's affection for his brother and ſiſter, and a conſequential anxiety to put them both on the ſame footing. It was only ſaying, " If my brother and ſiſter ſhall *both* have younger " ſons, then neither ſhall have any *perſonal* and *immediate* be- " nefit from my property, but it ſhall go amongſt their younger " ſons;

" ſons; if neither ſhall have ſuch children, it ſhall go in moie-
" ties between *themſelves*; and if *only one* ſhall have ſuch a
" child, it ſhall alſo go to them, in order that where one has a
" benefit *perſonally*, the other may have it in the ſame way."
Add to this manner of underſtanding the firſt part of the will, where the teſtator's favour ſeems equally divided between his brother and ſiſter, that, on a further conſideration, either becauſe his ſiſter was a married woman, and therefore not ſo fit to have an abſolute property, or for ſome other reaſon beyond the reach of probable conjecture, the teſtator reſolved in ſome degree to deviate from his firſt plan of perfect equality between his brother and ſiſter, and inſtead thereof to admit his ſiſter's eldeſt ſon and his own brother ſucceſſively to a chance of the moiety which under the former bequeſt would have gone to her; and with this addition I ſubmit, that the teſtator's intent will appear perfectly clear, intelligible, and conſiſtent. But ſhould this plain way of conſtruing the will be rejected, it is conceived on the part of the appellants, that the import of the words of the teſtator will not only be deviated from, but his intention will appear obſcure, confuſed, and unaccountable.

The reſpondent's counſel may inſiſt, that this way of conſtruing the will was not preſſed at either of the hearings before the lord chancellor; and that if it ſhould prevail, it will exclude the reſpondent *wholly*; becauſe at the ſame time it gives one moiety of the property to the appellants, it will carry the other moiety to the perſonal repreſentatives of his mother Sarah Mitford, who are not parties to the cauſe.

To this objection I offer the following anſwer.—I confeſs, that the abſolute excluſion of the reſpondent by there being a younger ſon of the teſtator's ſiſter only was not preſſed before the court below; the turn and ſtreſs of the arguments there being on the point, whether the reſpondent as a younger ſon ſhould have the *whole* or a *moiety*. But this will only ſhew, that, in conſequence of the further ſtudy of a will confeſſedly nor without great difficulty in the conſtruction, the caſe has appeared in rather a new light. Yet if the conſtruction now contended for ſhould finally appear moſt conformable to the real intention of the teſtator, I apprehend, that the appellants come in time to have the advantage of it. Nor in contending for this conſtruction, is there any ſurprize on the counſel for the reſpondent; for as this line of argument is avowed in the reaſons in the printed caſe of the appellants, the counſel for the reſpondent will have the full opportunity of conteſting the point. The only difference thus lately taking up the point can make is, that the parties will in the firſt inſtance

inſtance and together have the judgment of the appellant court, including that of the judge of the court appealed from, inſtead of firſt having the judgment of the lord chancellor ſingly, and afterwards that of your lordſhips; a difference, which, though it ought to be avoided, where it is poſſible, yet, I preſume, is not ſuch, as ought to eſtop any party from availing himſelf of a new courſe of argument.

THIRD QUESTION.

This third and laſt queſtion is the only one, which was the ſubject of debate on the two hearings before the lord chancellor, and conſequently the only one, on which his lordſhip gave his opinion.

In few words, this queſtion is, whether the younger ſons of the teſtator's brother and ſiſter were intended to take *per ſtirpes* or *per capita*.—If the former conſtruction prevails, it is conceived, that it will carry one moiety of the diſputed property to the reſpondent and the other to the appellant Mrs. Wicker.—If the latter is adopted, it gives the *whole* to the reſpondent.

The words of the deviſe to the younger ſons of teſtator's brother and ſiſter, on which the reſpondent founds his claim to the *whole* of the property, is thus expreſſed:—*In caſe it ſhall happen that I ſhould die without iſſue, then I do give and bequeath the whole of my fortune or ſubſtance* EQUALLY TO BE DIVIDED BETWEEN *any ſecond or younger ſons of my brother John Wicker and my ſiſter Sarah wife of William Mitford, Eſq; by him or any other huſband ſhe may hereafter happen to intermarry with.*

The reſpondent contends, that by this deviſe it was the intention of the teſtator to diſtribute his property amongſt the younger ſons of his brother and ſiſter indiſcriminately, without regarding whether ſuch younger ſons were of his brother, or ſiſter, or the number from each; and that if there ſhould be a younger ſon of his brother or his ſiſter *only*, ſuch younger ſon ſhould take the *whole*; and conſequently, that as the teſtator's brother died without having any ſon, and his ſiſter died without any younger ſon beſides the reſpondent, the whole belongs to him.

For this diviſion *per capita*, it may be ſaid, that the words of the deviſe in their ſtrict and proper ſenſe import it:—and that the conſtruction given in various caſes to the words of the ſtatute of diſtribution, which directs the perſonal property of an inteſtate to be equally divided amongſt his next of kin, is an authority for ſuch a diviſion; the rule upon that ſtatute being, that where all the next of kin claim *jure ſuo* and not *jure repræſentationis*, the diviſion is ever *per capita*, which is exactly the preſent

ſent caſe :—and further, that there are ſome caſes, independant of the ſtatute of diſtributions, in which a diſtribution *per capita* in legacies ſimilar to the deviſe or legacy in the preſent caſe has been preferred.

But I beg leave to controvert the propriety of thus conſtruing the deviſe to the younger ſons of the teſtator's brother and ſiſter, and to contend for a diviſion of the property amongſt the younger ſons of the brother and ſiſter *per ſtirpes*; that is, for giving one moiety to the younger ſon or ſons of the brother, and another moiety to the younger ſon or ſons of the ſiſter: and I ſubmit to your lordſhips the following general propoſitions in favour of the latter conſtruction :

(1.) That according to ſtrict conſtruction the deviſe to the younger ſons of the teſtator's brother and ſiſter, conſidered by itſelf, will operate for a diviſion *per ſtirpes*.

(2.) That there are other parts of the will, ſome connected with the deviſe in queſtion, others independant of it, which ſtrongly enforce the conſtruction *per ſtirpes*.

(3.) That if the intention of the teſtator is doubtful, the conſtruction for a diſtribution *per ſtirpes* ought to be preferred.

(4.) That neither the caſes on the ſtatute of diſtributions, nor the other authorities alluded to, are applicable to the preſent caſe.

(1.)

The appellants do not allow, that the ſtrict ſenſe of the deviſe to the younger ſons of the teſtator's brother and ſiſter is with a diviſion *per capita*; for they conceive, that the ſtrict ſenſe is rather for a diſtribution *per ſtirpes*. The words *equally to be divided*, it is obſervable, immediately precede the word BETWEEN; and this latter word being derived from the word *two*, the words *equally to be divided* BETWEEN do together, in grammatical ſtrictneſs, mean a diviſion applicable to that number only; the word AMONGST being a more proper word for a diviſion applicable to a greater number. If, too, the words *equally to be divided* BETWEEN refer to a *bipartite* diviſion, they certainly point at a diviſion *per ſtirpes*, namely, the ſtock of the brother on the one part, the ſtock of the ſiſter on the other. To this it may not be amiſs to add, that as brother and ſiſter cannot marry, the deviſe to the younger ſons of the teſtator's brother and ſiſter ſhould be underſtood as *ſeparately* and *diſtinguiſhably*, as if the deviſe had been to the *younger ſons of the brother*, and the *younger ſons of the ſiſter*; and this alſo leads to a diſtribution *per ſtirpes*.

But

But such a rigid and technical construction is what the appellants least rely on; and I chiefly state it for the sake of repelling the argument of strict construction, which is likely to come from the other side.

(2.)

There are several previous and subsequent passages of the will, which tend to shew, that, by the devise to the younger sons of his brother and sister, the testator intended a division *per stirpes*.

It is observable, that in several parts of the will, where the testator gives the *whole* of his fortune to one person, he has supposed the case of there being only one devisee to take, and has accordingly provided for such person's taking the whole in the most express terms. Thus he puts the case of his having *only one son*, and expressly gives to such son the *whole*. So also he expresses himself in the event of his having *only one daughter*. But in the devise to the younger sons of his brother and sister, he omits supposing the case of one devisee, and confines his expression to a case, in which division would in *all events* be necessary. This exactly squares with the idea of a division *per stirpes*; because, if the devise to the younger sons of his brother and sister is understood as giving one moiety to the brother's younger sons, and the other to the sister's; then, notwithstanding the case of a younger son either of his brother only or of his sister only, such younger son could not take more than a moiety, and consequently the other moiety would go to a different person, that is, either to some person named in the subsequent devise over, or to the brother as residuary legatee.

Some slight inference may also arise for the appellants; because, in some other parts of the will where a division *per capita* is clearly intended, the testator is not content with directing his property to be *equally divided*, but adds *share and share alike*.

But these are not the passages of the will from which the appellants ask for much aid.

The passages, which I principally rely upon as an explanation of the devise to the younger sons of testator's brother and sister, and as evidence that the testator thereby meant a division *per stirpes*, are the devise over to the testator's brother and sister, and the subsequent modification of it by the special provision for the case of the sister's not having a younger son. These have both been already stated and discussed in considering the second question; but they require being again reasoned upon, though the purpose here is different. *There* they were referred to, for the sake of shewing, that the testator did not intend that the devise

deviſe to his brother's and ſiſter's younger ſons ſhould operate except in the event of *both* having ſuch ſons. *Here* they are appealed to, in order to prove, that if that deviſe is to operate in the event which has happened, namely, that of there being a younger ſon of *one only*, it muſt operate *per ſtirpes*, and conſequently give only a moiety of the teſtator's property to the reſpondent.

In the deviſe over on the contingency, *if teſtator's ſiſter and brother ſhould not have any ſecond or younger ſon*, he gives his fortune to his brother and ſiſter *equally to be divided between them ſhare and ſhare alike, and to their reſpective executors and adminiſtrators*. From this paſſage I beg leave to inſiſt, that a ſtrong inference ariſes in favour of applying a diviſion *per ſtirpes* to the immediately preceding deviſe. The words *equally to be divided*, and *ſhare and ſhare alike*, in this clauſe ſtrongly mark the equality of the teſtator's affection between his brother and ſiſter; and as they divide the property into equal moieties between the brother and ſiſter *perſonally*, ſo they lead the mind to ſuppoſe that a like diſtribution into moieties was in his mind, when by the preceding clauſe he gives a preference to their *unborn* younger ſons. That the teſtator intended that the two *parents* ſhould take in moieties, will not admit of a denial. How natural then is it to ſuppoſe, that the ſame teſtator, who in his bounty looked thus impartially and equally to the parents themſelves, ſhould mean the ſame equality between their iſſue, where the words uſed in this reſpect are capable of being ſo underſtood! But this reaſoning acquires great additional force, when it is conſidered, that, in the deviſe to the *executors* and *adminiſtrators* of the brother and ſiſter, the word *reſpective* is ſo emphatically introduced. The effect of the word *reſpective* is nothing leſs than this. In the event ſuppoſed, it divides the teſtator's property into two moieties, giving one to the brother's perſonal repreſentatives, the other to the ſiſter's; and conſequently in caſe of their dying *inteſtate*, the will operates as a diſtribution *per ſtirpes*, and carries one moiety to the *children* or *ſtock* of the former, the other to the *children* or *ſtock* of the latter. Thus it is proved, that as between *all the iſſue* of the brother and ſiſter, except *younger ſons*, the teſtator plainly intended, and has undeniably created, a diviſion *per ſtirpes*. How ſtrange then will it be to preſume, that he ſhould have an intention in reſpect to the *younger ſons* of the brother and ſiſter different from that apparent in reſpect to their other iſſue! The argument from all this, expreſſed in few words, ſtands thus.—The teſtator has confeſſedly declared a diviſion *per ſtirpes* as between the brother and ſiſter *themſelves*, as between their *executors*, as between their *adminiſtrators*, and conſequently as between their *elder ſons*, and as

between

between their *daughters* whether elder or younger; and this I urge to your lordships as a solid ground for presuming a like intention in respect to the *second* and *younger sons* of the brother and sister, till some words can be found manifestly and unambiguously importing the contrary.

The subsequent devise over to the elder son of the testator's sister comes still nearer home to the point I insist upon. In that the testator himself supposes the case of his sister's not having a second or younger son, for which event he thus provides. His words are, "*Provided always, and my will and meaning is, that notwithstanding any thing herein contained, in case I shall die without issue, and my sister Mitford shall not have any second or younger son born of her body; then and in such case I do give and bequeath* THE ONE HALF *of my fortune or substance to William Mitford, eldest son of my said sister Mitford, if he shall be living at the time of my decease; but in case of his death, and of the death of my said sister before me, then and in such case I give* THE WHOLE THEREOF *unto my said brother Wicker and his executors or administrators.*" The first remarkable thing in this devise over is the word THE before the words *one half.* THE is a word of reference, and here it is significantly used as such by the testator. To something it must refer, and that something could only be *what* the testator supposes to have been given by the previous part of his will to his sister's younger sons. The nature of the event shews, that such must have been his meaning; for in this part of the will he professes to give to his sister's eldest son what he had before given to her *younger sons*, and to make the former a *substitute* for the latter. This part of the will, therefore, is a key to the former part. It in effect is the same as if he had expressed, in direct terms, that *the moiety given by the previous part of the will to his sister's younger sons* should, in case of her not having such, go to her eldest son; which makes the intention to divide *per stripes* in the devise, on which the respondent builds his claim, quite apparent; for then certainly the sister's younger son or sons could not have more than a moiety. Here the argument may be reduced to a syllogism.—The elder son of testator's sister was a substitute for, and to take all that could be taken by her younger son. But the elder son could only have taken a moiety. Therefore the younger cannot take more.—So much for the *manner* of devising THE moiety to the sister's eldest son. But tho' the words THE *half-part* should not be deemed words of reference, still the mere giving a moiety to the eldest son of testator's sister in the event described furnishes the strongest arguments against a division *per capita.* It puts an absolute negative on dividing *per capita,* in case of the sister's not having a younger son.

Why

Why then ſhould the will be conſtrued to mean ſuch a diviſion in the caſe of the brother's not having a younger ſon? Shall it be preſumed, that the teſtator intended to divide *per capita* in *favour* of the ſiſter's younger ſons, but not in favour of the brother's younger ſons? At the time of the will neither brother nor ſiſter had a younger ſon. Therefore no *prædilection* for the younger children of either can be attributed to the teſtator. Yet it will be difficult to impute ſuch a partial diſtribution to the will on any other ground. If any partiality can be ſuppoſed in the caſe, it muſt be by reference to the perſons of the teſtator's brother and ſiſter. But then, unfortunately for the reſpondent, the argument of partiality muſt operate for the appellant's; becauſe, as far as the will avows any thing like partiality, it is in favour of the brother, not againſt him. In him the teſtator repoſes his *whole confidence*, making him *truſtee* of the real eſtate, *executor* of the perſonalty, and *guardian* of the teſtator's own children. Him the teſtator makes *reſiduary deviſee and legatee*, thereby giving him every intereſt undiſpoſed of in both kinds of property. In ſuch a caſe to infer from doubtful words, that the teſtator intended a diſtribution *per ſtirpes* for the advantage of the ſiſter's family, without having a like intention in reſpect of the brother's, would be to reverſe the partiality avowed by the teſtator for his brother, and to divert the courſe of it wholly in favour of the ſiſter. Such a conſtruction ſeems moſt injurious to the brother. It would be eſtabliſhing a diviſion *per ſtripes* in favour of one ſide only. If the will would bear the conſtruction of ſuch a diviſion for both the brother's and ſiſter's younger ſons, it would at leaſt be free from the objection of an injurious partiality; becauſe then it would give both branches an equal benefit of the contingency of the brother and ſiſter's having moſt younger ſons; for, as a learned civilian juſtly obſerves, *ubi fortuiti caſus (a), par in utramque partem ratio eſt, neuter lædi videtur.* But allowing a diviſion *per ſtirpes* for the ſiſter's ſons, and denying it to the brother's, would be groſsly partial; and not only ſo, but to the family of the perſon leaſt favoured by the will, and againſt the family of the perſon moſt favoured.

It may indeed be argued, that the deviſe over on the contingency of the ſiſter's not having a younger ſon could not be introduced for any purpoſe, unleſs it was to eſtabliſh a partial diviſion *per ſtirpes* in favour of the ſiſter's elder ſon, and ſo far to vary the deviſe to the younger ſons of the brother and ſiſter. But in fact there is a very different and moſt obvious reaſon for this addition to the will, as I have before obſerved, in arguing

(a) Vinn. in Inſt. lib. 3. tit. 5.

the

the ſecond queſtion of the cauſe. It was not the aim of the teſtator to change the diſtribution before appointed amongſt the younger ſons of his ſiſter and brother, by ſubſtituting a partial diviſion *per ſtirpes*; for the former deviſe will well bear the conſtruction of having eſtabliſhed ſuch a diſtribution equally in favour both of his ſiſter's younger ſons and his brother's. But it was apparently his intent to alter the deviſe over to his brother and ſiſter on default of younger ſons, ſo far as related to the ſiſter's moiety; and to do this, by letting in her eldeſt ſon and eventually his brother to her moiety, inſtead of leaving it to her abſolutely.

(3.)

Should the words of the will material to the preſent queſtion be deemed of doubtful conſtruction, I humbly conceive, that there are various grounds for adopting the conſtruction, which is adverſe to a diſtribution *per capita*, and conſequently adverſe to the reſpondent.

There is an equity in the diviſion *per ſtirpes*, which renders it more conformable to the natural ſtream of juſtice than the diviſion *per capita*; and it is on this principle, that the writers on the law of nature recommend it in the caſe of ſucceſſions. Puffendorf ſtates the principle of the ſucceſſion *per ſtirpes* with great ſenſibility, ſtrongly obſerving in favour of children who loſe their parents, "that it would indeed be a lamentable misfortune, if, beſides the untimely loſs of their fathers, they "ſhould further be deprived of thoſe poſſeſſions, which either "the rule of law or the deſign of their progenitors had given "their parents juſt hopes of enjoying *(a)*".

Accordingly the ſucceſſion *per ſtirpes* has been preferred by ſome of the wiſeſt and moſt poliſhed nations.—The *jus repræſentationis*, of which ſucceſſion *per ſtirpes* is a conſequence, was univerſally admitted by the Jewiſh law, both amongſt lineal and collateral heirs; for, as Mr. Selden in his book on ſucceſſions amongſt the Hebrews, latinizes a paſſage from the Talmud, *eſt regula univerſalis, ubi quis in ſucceſſione eſt præferendus et ipſe, etiam è femore ejus egreſſa eſt itidem præferenda (b)*.—It is alſo undeniable, that the Roman law was equally favourable to the ſucceſſion *per ſtirpes* and the *jus repræſentationis* ſo far as regarded *lineal* heirs; for ſuch *lineal* heirs, however remote, took by repreſentation *in infinitum*, and the ſucceſſion *per ſtirpes* prevailed univerſally, as well where ſome of the heirs claimed *jure proprio* and others *jure repræſentationis*, as where all claimed in the latter way. This was clearly the Roman law as regulated by the 118th novel of the emperor Juſtinian. But there was ſome difference in re-

(*a*) Puffend. Law of Nature and Nations, b. 4. c. 11. ſ. 12.
(*b*) Seld. de ſucceſ. ad leg. Hebræor. cap. 1.

ſpect

ſpect to *collaterals*. The novel expreſsly provided, that the children of deceaſed brothers and ſiſters ſhould come in with thoſe which were living; and that in ſuch a caſe the diſtribution ſhould be *per ſtirpes*. But it excluded from the benefit of repreſentation all collaterals beyond brother's and ſiſter's children, and directed a diviſion *per capita* according to mere proximity of blood in all the remoter degrees. Hence grew a famous point of controverſy amongſt the commentators upon the Roman law, concerning which in ſome countries of Europe they are probably divided in opinion at this day. The point is, what ſort of diviſion the emperor intended, where *only* the children of the brothers and ſiſters are the heirs; ſome in the caſe propoſed holding for a diſtribution *per capita*, others for a diſtribution *per ſtirpes (a)*. *Voet* in his commentary on the Pandect is unheſitatingly for the former diſtribution. *Vinnius*, who enters into the controverſy more fully, ſtates the reaſons and authorities on each ſide in two different pieces; firſt, in his commentary upon the Inſtitutions; and ſecondly, in his *Selectæ Juris Queſtiones*. But it is remarkable, that in both works, though Vinnius begins with declaring his own opinion to be for the diviſion *per capita*, yet he concludes with wavering, and with a doubt, whether this conſtruction of the novel be altogether according to the mind and intention of Juſtinian, without adding ſome limitation to the doctrine at firſt adopted *(b)*. One great argument for the diſtribution

(*a*) The controverſy on the point here mentioned is of very ancient date, being traceable into ſome of the earlieſt gloſſes on the text of the Roman law. Azo takes the lead amongſt the doctors who decide for the ſucceſſion *per capita* in the caſe ſuppoſed; and he died in the year 1200. His ſcholar Accurſius is the foremoſt of thoſe, who inſiſt on the conſtruction *per ſtirpes*. The diſſention thus originating was of long duration. Which is the better of the two opinions, was not perfectly ſettled in the beginning of the 17th century; though ſome years before the accompliſhed Cujacius had declared for Azo without any ſeeming heſitation. (Cujac. in lib. 2. de feod. tit. 11.) Hence, as I preſume, it was, that cardinal Mantica, in his book *de tacitis et ambiguis conventionibus*, the dedication of which to pope Paul the Fifth is dated by its author in 1609, thought it neceſſary to ſtate largely the reaſoning and authorities on each ſide of the controverſy. Notwithſtanding alſo that this learned cardinal upon the whole appears to have preferred Azo's opinion, yet he confeſſes the extreme difficulty of the point; noticing, that Tiraquellus had deſcribed it as more obſcure than Cimmerian darkneſs, and ſhewing that Baldus and other diſtinguiſhed commentators had been unſteady in their ſentiments upon the queſtion. (Mant. de tac. et amb. convent. lib. 23. tit. 31 & 32.) Other writers on the civil and feudal laws ſubſequent to Cujacius, who make a copious diſplay of the authorities on this litigated topic, are Schoner a German lawyer in his feudal diſputations publiſhed in 1697, and De Barry a French lawyer in his large work *de ſucceſſionibus teſtati ac inteſtati* which came out in 1693. (Schoner. lib. 1. diſp. 6. ſ. 74. De Barry lib. 18. t. 3.) To theſe two latter authors, both of whom readily ſubſcribed to the opinion for dividing *per capita* where the ſucceſſion falls upon nephews and nieces only, ſhould be added Vinnius in his commentary upon the Inſtitutions and in his *Selectæ Juris Quæſtiones*.

(*b*) The limitation is, that the opinion for dividing *per capita* ſhould hold only where *fratrum filii ex propriâ perſonâ veniunt, non autem quando vocantur ad excluſionem aliorum*,

distribution *per capita* is, that the ancient law was for it, and that the emperor in his novel only introduced the *jus repræsentationis* in favour of a deceased brother's and sister's children, to prevent exclusion of them where the intestate left a brother or sister surviving; and that he doth not admit them *per stirpes* in any other case. But when, on the other hand, it is considered, that the only part of the chapter relative to collaterals in the 118th novel, which expressly professes to direct a distribution *per capita*, merely commands it for the degrees beyond brother's and sister's children, a candid and impartial person must allow, that there is room for doubt. However it should not be concealed, that in England the prevailing opinion amongst our civilians has been in favour of those, who interpret the novel, not to intend a succession *per stirpes* amongst collaterals where all the heirs claim *juro suo*. At least the like construction, which has been applied to our statute of distribution, as I shall hereafter more particularly notice, with the manner in which that construction is defended, imports as much. But still, with this exception of *collaterals all* claiming without aid from the right of representation, it is certain, that the Roman law, as regulated by the emperor Justinian, preferred the succession *per stirpes*; and that it has been followed in that preference by the laws of some of the principal states now existing in Europe.

aliorum, qui aliàs aut cum iis concurrent aut eos ipsos excluderent. This accords with Azo's doctrine as explained and improved by the more enlightened comment of Cujacius: and I take it to be the doctrine by which collateral succession both to feudal and allodial property has been for the last century most generally regulated through the greatest part of the continent of Europe. However, it should be remembered, that the descent of *real* estate in England has been immemorially fixed in conformity to Accursius's rule of succeeding *per stirpes*, not only as amongst the children of brothers and sisters, but as amongst collaterals generally in the same unlimited extent as amongst lineal heirs. It is also proper to recollect in reading foreign jurists on this subject, that it should ever be discriminated, whether they write with a view to feudal or allodial property; and that the like attention should be shewn in respect to moveables and immoveables. The distinction between realty and personalty in England is peculiar to ourselves. As to the Roman law of successions, it embraced property of every kind without a difference: and though in most of the states of Europe the rule of succession varies much according to certain prevailing classifications of property; yet throughout a tincture of the Roman law of succession, more especially as it was newly modified by the 118th novel of Justinian, will most probably be discoverable by a nice observer. Whoever, therefore, wishes to investigate historically the progress of the law of successions, either in England or in any other country of Europe, should never lose sight of that famous imperial novel. The French lawyers in general write as if well convinced of the utility of thus keeping in mind Justinian's constitution; for, in treating on this branch of jurisprudence, they continually refer to the novel as influencing their whole system of the law of inheritance. Yet that system is remarkably diversified by an infinitude of various customs; not only almost every province having some peculiarity, but even far smaller districts being so distinguished. See Domat's Civil Law, and a treatise on successions according to the French laws, which within these few years has been published amongst the posthumous works of Monsr. Pothier.

The

The common law of England favours the conſtruction *per ſtirpes*, in preference to the diviſion *per capita*. It is therefore a canon or fixed rule in the deſcent of land, that there ſhall not only be a ſucceſſion *per ſtirpes*, but that this ſucceſſion ſhall prevail univerſally and *in infinitum* amongſt collateral heirs, as well as lineal. Thus, if there be two ſiſters, and one of them dies leaving four daughters, and then the father of the two ſiſters dies without male iſſue, the ſurviving ſiſter ſhall inherit one moiety of the father's land, and the other moiety ſhall be diviſible into four parts amongſt the four daughters of the deceaſed ſiſter. In this caſe thus ſuppoſed one deſcendant takes *jure ſuo*, and the reſt *jure repræſentationis*. But the rule is the ſame where all the claimants take in the latter way; for if there be two ſiſters, and one dies leaving one daughter, and the other dies leaving four daughters, and then the father of the two ſiſters dies, one moiety of his land deſcends on the daughter of the ſiſter having only one daughter, and the four daughters of the other ſiſter take only one moiety between them.

The diviſion *per ſtirpes* beſt ſuits the language of the particular will now in queſtion. It appears from the will, that the teſtator's brother poſſeſſed at leaſt as much of his affection as his ſiſter. The diſtinction in favour of the brother, by the will's making him not only ſole guardian of the teſtator's children and ſole truſtee of his eſtate, but alſo reſiduary deviſee and legatee, would even warrant inſiſting, that the teſtator's affection for his brother preponderated. But a ſucceſſion *per capita*, ſhould it prevail, muſt operate with the greateſt partiality for the ſiſter; for it will carry the whole of the teſtator's fortune to his ſiſter's children in the moſt perfect excluſion of the brother's; whereas the diſtribution contended for by the appellants, as the one intended by the teſtator, will diſtribute the property in equal parts between the two branches of the family.

But weighty as all theſe conſiderations are, the only aid the appellants claim to have from them is, that, if the intent of the will in queſtion be ambiguous, they may be received as a juſt ground for turning the balance in favour of a diſtribution *per ſtirpes*.

(4)

The appellants conceive that there are not any determined caſes, which go far enough againſt a diſtribution *per ſtirpes*, to reach in any reſpect the will now in debate.

The authorities for a diviſion *per capita* are of two kinds: firſt, caſes on the ſtatute of diſtribution; ſecondly, caſes independant of it.

The parts of the ſtatute of diſtribution *(a)* material to the point of diviſion now to be conſidered are Sections 5, 6, and 7.

(*a*) 22 & 23 Ch. 2, ch. 10.

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The fifth Section gives one-third "to the wife of the inteſtate, "and all the reſidue by equal portions to and amongſt the *chil-* "*dren* of ſuch perſons dying inteſtate, and *ſuch perſons as legally* "*repreſent ſuch children*, in caſe the ſaid children be then dead." The ſixth Section directs, "that in caſe there be no children "nor any legal repreſentatives of them, then one moiety of the "ſaid eſtate to be allotted to the wife of the inteſtate, the reſidue "of the ſaid eſtate to be diſtributed equally to *every of the next* "*of kindred of the inteſtate who are in equal degree, and thoſe who* "*legally repreſent them.*" The ſeventh Section provides, "that "there ſhall be no repreſentation admitted amongſt collaterals "after brother's and ſiſter's children; and in caſe there be no "wife, then all the ſaid eſtate to be diſtributed equally to and "amongſt the children; and in caſe there be no child, then to "the next of kindred in equal degree of or unto the inteſtate, "and their legal repreſentatives as aforeſaid, and in no other "manner whatſoever."—As to the caſes on this ſtatute, they certainly prove it to be a ſettled conſtruction of it, that where the next of kin of the inteſtate are collaterals, a diſtinction is to be made; and that where ſome are next of kin *in their own perſons*, and ſome only *jure repræſentationis*, the diſtribution is to be *per ſtirpes*; but that where all are next of kin in their own perſons, though they make out their pedigree through *different* ſtocks, the diſtribution muſt be *per capita*. Therefore if the next of kin conſiſt of a brother and three children of a deceaſed ſiſter, the brother takes one moiety of the inteſtate's perſonal eſtate, and the other moiety is diviſible in equal parts amongſt the ſiſter's three children; and on the other hand, if the next of kin are two children of a brother and three of a ſiſter, the property is diſtributable amongſt the five equally. This diſtinction is ſaid to have been agreed in *Clarkſon* and *Spateman* before the Delegates in 1668, which caſe is cited in Bunbury's Reports 157. It was afterwards adopted by lord chancellor Somers in the caſe of *Walſh* and *Walſh*, which was heard in 1695, and is reported in Prec. in Chanc. 54. and Eq. Caſ. Abr. 249. There is alſo a ſeries of ſubſequent caſes, which have been determined in conformity to the diſtinction; namely, *Wall* and *Needham* in the exchequer 28th June 1711, cited in Bunbury 158; *Janſon* and *Bury* by the court of exchequer Hill. 1723, in Bunb. 158; *Durant* and *Preſtwood* by lord chancellor Hardwicke 30th June 1738, in 1 Atk. 454; *Stanley* and *Stanley* before lord Hardwicke 4th May 1739, and in 1 Atk. 455; *Page* and *Book* at the Rolls 24th June 1742, cited and ſtated in 2 Veſ. 214; and *Lloyd* and *Tench* 6th March 1751 at the Rolls, in 2 Veſ. 213.—With ſo many reſpectable authorities for the diviſion *per capita* in the caſe propoſed, it would be vain to deny the doctrine ſo far as it goes. At the ſame time

it may not be improper to obſerve, that it admits of a doubt, whether ſuch a conſtruction of the ſtatute of diſtribution was not originally a violence to the intention of thoſe who framed it. Why I make this conjecture, will preſently appear.

It is well known, how much connected the ſtatute of diſtributions is with both the civilians and their law. The eccleſiaſtical judges attempted, by ſuits in their courts, and by taking bonds from adminiſtrators, to enforce a diſtribution of the perſonal eſtates of inteſtates amongſt their next of kin; and the diſtribution they followed was borrowed from the Roman law, as regulated by the conſtitutions of the emperor Juſtinian. But they were interrupted by prohibitions from the temporal judges. This drove the civilians into parliament for redreſs; and thence originated the ſtatute of diſtributions. Sir Thomas Raymond 498. The reaſons in favour of the ſtatute were framed by that eminent civilian and ſtateſman Sir Leoline Jenkins, and are to be ſeen in his works. It is an anecdote from lord chief-juſtice Holt, that the ſtatute itſelf was drawn by Sir Walter Walker, another civilian. 1 P. Wms. 27. The great outline of the ſtatute is apparently borrowed from the 118th novel of Juſtinian.—Such therefore being the origin of the ſtatute; and it being alſo conſidered, that our civilians had adopted that ſide of the controverſy, about the 118th novel of Juſtinian, which rejected a diviſion *per ſtirpes* amongſt collaterals where all claimed *jure ſuo*; it is not ſurpriſing that they ſhould encourage a like interpretation of the ſtatute of diſtributions; or that our courts of equity ſhould follow them on a ſubject, which before that ſtatute the civilians had the ſole conuſance of, and to a judgment of which, as being founded on their own law concerning ſucceſſions, they might well be deemed moſt competent.—But notwithſtanding the peculiar reſpect and deference fit to be ſhewn to the learned gentlemen of the civil law on ſuch a point, yet it ſeems queſtionable, whether the influence of their authority has not been the cauſe of a miſconſtruction of the ſtatute of diſtribution. From the account before given of the controverſy on the novel of Juſtinian, it appears, that there is room for doubting, whether it was even intended by that novel to diſallow of a diſtribution *per ſtirpes*, where nephews and nieces, deriving through different ſtocks, were the only heirs. But there were ſtill more cogent reaſons for not giving ſuch a conſtruction to our ſtatute of diſtribution. The novel, though ambiguouſly expreſſed as to collaterals deriving through different ſtocks, was ſo explicit as to deſcendants, that even our civilians admit, that amongſt the latter the diſtribution *per ſtirpes* was univerſal, and without any exception *.

* See Dr. Harris's notes on the 118th novel, chap. 1. at the end of his edition of Juſtinian's Inſtitutions.

But

But our ſtatute of diſtribution contains the ſame words of proviſion for diſtributing amongſt deſcendants and amongſt collaterals, with this difference only, that in caſe of collaterals the right of repreſentation is limited to brothers and ſiſters children; and that, in the firſt place, where collaterals are named, *every* is added to the deſcription. From this obſervation, a curious dilemma ariſes; for unleſs the word *every* ſhall be conſidered as a ground of diſtinction, which hitherto has not been attempted, either the ſtatute has been miſconſtrued, or there is no ſuch thing as a diſtribution *per ſtirpes*, any more as to deſcendants than as to collaterals, except where ſome of the claimants come in *jure ſuo*, and others *jure repræſentationis*. A very diſtinguiſhed civilian of the preſent times (to whom his country already ſtands highly indebted for his elegant and maſterly edition of Juſtinian's Inſtitutions, and to whom it may owe far more if he ſhould proſecute his deſign of a more enlarged Commentary) ſeems to have been almoſt aware of this difficulty; and, as if he thought conſiſtency required it, he openly contends on our ſtatute of diſtribution, for excluding the diſtribution *per ſtirpes*, even as amongſt grandchildren, when they are the only claimants: though he candidly confeſſes, that by Juſtinian's law it was clearly otherwiſe, and that he did not meet with any judicial determination to prove the doctrine in reſpect to our own law *. But it may be doubted, whether our courts of equity would be eaſily induced thus to extend this reſtrictive conſtruction of the diſtribution *per ſtirpes* to deſcendants. It was once indeed attempted before lord chancellor Hardwicke. But, after hearing the point diſcuſſed, he diſcouraged the idea of a diſtribution *per capita*, and gave an opinion againſt it, though not a final one †.

From this detail, in reſpect to the caſes determined on the ſtatute of Charles the Second, for a diſtribution *per capita* between collaterals deriving through different ſtocks, but all claiming as next of kin in their own perſons, I claim to infer, that your lordſhips will not be very partial to the principle of the precedents, and conſequently will be little inclined to extend it to a new ſet of caſes.

But be this as it may, I for the appellants beg to inſiſt, that the preſent caſe is ſo diſſimilar to the caſes on the ſtatute of diſtribution, as to prevent all compariſon. Here the great ſtreſs of the argument is on the intent of the teſtator, made manifeſt by *ſpecial words and clauſes*, ſuch as neither occur in the novel of Juſtinian, nor in its intended counterpart our ſtatute of diſtribu-

* See Dr. Harris's edition of Juſtinian's Inſtitutions, in his notes on the novel at the end of page 3, and alſo in his notes on lib. iii. p. 5.

† See Lockyer v. Vade, Barnardiſt. Chan. Rep. 444.

tion.—*First*, there is the deviſe over to the teſtator's ſiſter and brother, and their *reſpective* executors and adminiſtrators, in caſe of default of their not having younger ſons.—*Secondly*, there is the ſubſequent deviſe over of THE HALF of the teſtator's fortune, in language pointedly referring to the preceding deviſe to his ſiſter's and brother's younger ſon, as to a deviſe between the *two branches* of his family in *moieties*.—*Thirdly*, there is the expreſs diviſion *per ſtirpes*, as againſt the brother's younger ſons, in favour not only of the ſiſter's eldeſt ſon in the event of her not having younger ſons, but alſo eventually in favour both of the ſiſter and brother ſucceſſively. This laſt proviſion alone, independently of the other ſpecial circumſtances, independently of all the numerous arguments before urged both from the general plan of the will and the particular language of it, ſeems fully adequate to diſtinguiſhing the preſent caſe from the ſtatute of diſtribution; for who can doubt, if that ſtatute had appointed a diſtribution *per ſtirpes* in favour of a ſiſter's children, but that in the conſtruction it would *pari ratione, pari materiâ*, have reached a brother's?

As to the caſes independant of the ſtatute of diſtribution, the chief of them are *Bretion* and *Lethieulier*, 2 Vern. 653. *Weld* and *Bradbury*, 2 Vern. 705. *Northey* and *Strange*, 1 P. Wms. 340. *Davers* and *Deeves*, 3 P. Wms. 40. *Blackler* and *Webb*. 2 P. Wms. 383. and *Thomas* and *Hole*, Forreſt 251.—But it is conceived, that not one of theſe caſes can be applied ſo as to affect the conſtruction of the will now in debate. In the firſt of this ſeries of caſes, what was determined is not ſtated; and though in all the reſt the court held for a diviſion *per capita*, it was ſimply on general deviſes to *children* or *grand-children* of various perſons, unattended with any of thoſe ſpecial words and circumſtances, on which the appellants put in their claim for a diſtribution *per ſtirpes*. Beſides, in all of them the court apparently took the rule from the conſtruction given for the ſtatute of diſtribution; ſo that the ſame reaſons, which exempt the preſent will from the rule taken on the ſtatute, equally militate againſt arguing from theſe caſes.

CONCLUSION.

Upon the whole I, as counſel for the appellants, do ſubmit to your lordſhips, that on the firſt of the three great queſtions, into which I have branched the caſe, the teſtator's brother, the late John Wicker, was entitled to the *whole* of the perſonal property in controverſy between the parties; and that though your lordſhips ſhould decide this firſt queſtion againſt the appellants, yet the late Mr. John Wicker was on both or one of the two other queſtions

queſtions before argued, *at leaſt* intitled to a *moiety* of ſuch property.—It only remains to obſerve further, that as the two former of the three queſtions, here argued for the appellants, come before your lordſhips as new points undebated in the firſt ſtage of the cauſe, and conſequently unprejudiced by the principle on which the decree complained of was made: ſo the third queſtion, which was the only one really debated before the court below, was, as I underſtand, decided there on both hearings in a manner, which indicated much doubt on the real intent of the teſtator. Under theſe circumſtances I truſt, that I ſhall ſtand excuſed for offering to your lordſhips ſo large a comment on the will in queſtion; and alſo that no diſadvantage will be incurred by the appellants themſelves, from the circumſtance of having their claim now argued on larger ground before your lordſhips as a court of appeal, than was attempted before the court of original juriſdiction. Indeed, in this reſpect, the appellants and reſpondent appear before your lordſhips on much the ſame footing.—The appellants, it is true, confeſs, that tho' the pleadings left their counſel at liberty to inſiſt for them on a title to the *whole* of the property in diſpute; yet it did not ſtrike their counſel, when the cauſe was heard before the lord chancellor, that there was ground to argue for their having more than a *moiety*.—But then it is equally undeniable by the reſpondent, that when he firſt came into chancery, he only claimed a *moiety*, though afterwards in the cauſe now before your lordſhips he inſiſted on a title to the whole.—Thus both parties appear at different times to have been in equal doubt about the extent of their reſpective claims; and conſequently if any prejudice ſhould hence ariſe, each party is equally affected by it.

OBSERVATIONS

CONCERNING THE

RULE in SHELLEY'S CASE,

NAMELY,

"That *heirs of the body*, or other inheritable words, after an "eſtate for life, ſhall operate as words of *limitation*, not "of *purchaſe*."

CHIEFLY WITH A VIEW TO THE

APPLICATION of that RULE to LAST WILLS.

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CONCERNING THE

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APPLICATION of that RULE to LAST WILLS.

IN Shelley's caſe, as reported by Lord Coke ‡, the counſel, who argued for the defendant, ſtate it to be a rule in our law,—" that when the anceſtor by any gift or conveyance takes " an eſtate of freehold, and in the ſame gift or conveyance an " eſtate is limited either *mediately* or *immediately* to his heirs in " fee or in tail, *always* in ſuch caſes *heirs* are words of *limitation* " of the eſtate, and not words of *purchaſe*."

The rule ſo expreſſed is to be found ſubſtantially ſtated in numberleſs other reports and books of our law, as well thoſe before and in lord Coke's time, as thoſe ſince publiſhed. But it is here given from his report of the caſe of Shelley; becauſe that report is ſo conſtantly referred to as the moſt known depoſitory of the rule, that in common parlance the rule has thence obtained an appellation, being for the ſake of ſhortneſs moſt uſually deſcribed as the *Rule in Shelley's caſe*. It may be added as a further inducement for ſo extracting the rule, that perhaps it is not to be met with elſewhere in language more fully or more correctly expreſſive of the doctrine meant to be conveyed.

Concerning this rule there has been long agitated an obſtinate and a perplexing controverſy, on each ſide of which very eminent judges and lawyers have arranged themſelves.

The diſpute is not from any doubt of there being ſuch a rule. That a rule to the effect ſtated was incorporated into our law of real property from the earlieſt times, conſtituting a part of the firſt texture of our ſyſtem; and that the rule ſtill continues in force; are truths too evident to be queſtioned even by thoſe, who are moſt inclined to reſiſt and contract its influence. It is on the extent in which the rule ought to be applied, not on its great antiquity or its preſent exiſtence, that the diverſity of opinion has been exerciſed.

It is of the firſt importance, that all general rules or principles of law ſhould be clearly and entirely underſtood; for where it is

‡ 1 Co. 104. 2.

otherwiſe,

otherwiſe, the adminiſtration of juſtice muſt be confuſed, fluctuating, and arbitrary; the conſequence of which is a miſerable ſtate of inſecurity to the people, whoſe perſons, characters, and property are liable to be affected.

In every point of view the rule of law in queſtion claims to be conſidered as a general one. It profeſſedly and directly operates upon all the *real* property of the kingdom: and though its original was quite foreign to *perſonal* eſtates; yet theſe, from ſubſequent cauſes, and by a ſort of adoption, have in ſome degree been brought within the ſphere of its action. The caſes in which it becomes requiſite to enquire, whether they ought to be governed by this rule, have been continually occurring; and ſo long as the grand foundations of our preſent ſyſtem of law ſhall remain, thoſe caſes muſt be expected to ariſe as often in future. Whenever alſo ſuch caſes do occur, the title to the property in diſpute muſt depend on the queſtion, whether the rule ought to be applied or not. If the rule is applied to the entail of real property, it enlarges the eſtate for life into an inheritance, and ſo arms the tenant for life with the incidental powers of defeating the ſucceſſion to his heirs, and leaves the entail upon them at his mercy. But where ſuch a caſe eſcapes the rule, the entail is moſt commonly ſecure againſt all acts of the tenant for life; the charge or alienation by him becoming fruitleſs and unavailing from the moment of his death, as much as if his heirs had not been named. In the inſtance of perſonal property, with which the rule can never be in the leaſt connected, except where ſuch property is entailed as if it was real eſtate, the difference between admitting the rule and excluding it is equally concluſive upon the title. If the rule is reſorted to, the tenant for life becomes abſolute proprietor of the entailed perſonalty, and the entail is a nullity without ſo much as the aid of any form to produce that effect; whereas the rule being laid aſide, the tenant for life is a mere uſufructuary, without any power over the ſubſtance of the thing beyond the enjoyment of it for his own time.

Upon this view of the rule it is apparent, that the manner of applying it ought to be directed by ſome plain, eaſy, and unambiguous principle; and that if ſuch a rule ſhall have become involved in the veil of myſterious abſtruſeneſs, the titles to both real and perſonal property muſt be continually open to great doubts, and conſequently to very miſchievous litigations.

But notwithſtanding this; and alſo notwithſtanding the numerous caſes in which the rule has been elaborately argued, with the ſucceſſive adjudications upon it, more eſpecially the ſolemn opinions given a few years ago by all the judges of England in the great caſe of Perrin and Blake; it may be doubted, whether the controverſy on the rule is yet ſatisfactorily cloſed. Nay, it may even be a queſtion, whether the learned diſputations of lat-

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ter times have not rather tended to ſhake the true and antient foundation of the rule, than deciſively and finally to fix its proper boundary: and if this really be ſo, there is ſtill remaining a very dangerous ſource of new contentions.

It is feared indeed, that theſe ſuggeſtions of material doubt and complication, in a matter underſtood by many to be concluſively ſettled, may expoſe their author to the imputation of a bold and diſguſting preſumption. Nor will the danger of his being ſo charged be a little aggravated, when it is known, that he is a profeſſional lawyer of very inferior conſideration, one juſtly ranked and ever likely to remain in one of the loweſt of the forenſic claſſes; and that his conception of the ſubject involves him in a difference of ſentiment, with ſome who heretofore have eminently filled, and with others who ſtill ſit ſhining ornaments on the higher juridical forms. He foreſees too, that the hazard of offending is ſtill farther augmented in reſpect of ſome ſhades he means to give in the repreſentation of the ſubject, which conſtitute at leaſt a ſemblance of diſagreement with ſome of the moſt diſtinguiſhed leaders on both ſides of the controverſy in queſtion: for though he certainly unites with thoſe, who uphold a ſtrict obſervance of the rule; yet, as he underſtands them, it is not altogether upon the ſame principle; but upon a reaſoning, according to which the rule is even more abſolute and peremptory than they ſeemingly conceive it to be; and alſo with an admiſſion, that if the rule was not ſo unqualified as to be quite indiſpenſable, there would be great force in the line of argument chiefly relied on by the enemies of the rule. Thus by taking ſomething like a third courſe (not of the middle kind indeed, becauſe his notion carries him into an extremity beyond the moſt rigid of the two current opinions) he may be conſidered as a ſort of neutral perſon, and as ſuch fail of being well received by either party.

Theſe are diſcouragements, which might well deter the preſent obſerver from attempting to publiſh his thoughts on a ſubject, about which the moſt accompliſhed underſtandings are divided. Accordingly he has often laid down the pen, in perfect deſpair of being able to acquit himſelf of ſuch a taſk, in a manner in the leaſt ſatisfactory to thoſe, for whoſe uſe his labours are deſigned, and to whoſe judgment the rectitude of his ſentiments muſt of courſe be referred.

But on the other hand there are conſiderations of a very oppoſite tendency. The preſent obſerver, after re-iterated ſtudy of the nature of the rule in Shelley's caſe, and the fulleſt attention to the arguments of others upon it, feels a perfect conviction, that a portion of the genuine ſpirit of the rule has inſenſibly evaporated; that its native ſtrength has been impaired, and its original ſimplicity diſguiſed, by the ſubtleties of modern ingenuity;

and

and that unleſs an effort ſhall be ſpeedily made to diſembarraſs the rule from the perplexities with which it has been latterly over-run, it will degenerate, from a plain direction for diſcriminating titles to property, into a downright enigma for diſturbing them. With this impreſſion of ſome of the prevailing modern comments upon the rule, it is a ſort of duty to riſque an attempt for obviating the miſchiefs apprehended: and to ſhrink from the taſk on account of the threatening dangers would be an unmanly conduct. It is alſo a very ſtrong incitement to the attempt, that the ideas, which are now meant to be ſubmitted to the whole profeſſion of the law, have been long heretofore opened, in private converſation, to ſome profeſſional friends of diſtinguiſhed underſtanding and judgment, and from them have often met more than with a very favourable and indulgent reception; for ſome of the reſpectable perſons alluded to have often expreſſed ſurprize, that he ſhould continue to confine all his thoughts within the narrow circle of his private connections, and be ſo dilatory and reluctant in execution of his promiſe to reduce his ideas into a form fit for public uſe; whence it is natural to infer, that his comment upon the rule in Shelley's caſe was far from being deemed either a needleſs or an improper one. Nor are other encouragements altogether wanting. A late judge, whoſe inſtitutions of our law and other juridical writings ought to perpetuate his fame, a ſhort time before his death, imperfectly heard from the preſent obſerver, what was the general import of his ſentiments on the rule in Shelley's caſe; and it is hoped, that the moſt delicate feelings, in reſpect to private converſation, will not be offended at the now obſerver's ſo far ſeeking for ſhelter from the impreſſions ſeemingly made on that very great judge, as to confeſs, that he did not appear diſpleaſed with the explanations he heard. If, therefore, the preſent obſerver did not, from a blind and extravagant partiality for his own notion, miſinterpret the manner in which they were thus received, it may be ſaid to have approached to a ſort of implied ſanction to a more extended communication. If too this be an allowable conſtruction, it deſerves more weight; becauſe, however differently Mr. Juſtice Blackſtone's own arrangement of the authorities, in his famous argument on Perrin and Blake, may tend, yet his ideas of the principle and force of the rule moſt apparently claſh with thoſe, which will be here diſcloſed: for in that argument he not only moſt expreſsly excludes the rule from the claſs of thoſe higher rules or maxims which are founded upon ſome poſitive *national* policy, but even refuſes to admit the rule into that *ſecondary* claſs of rules of policy which he denominates *juridical*, and ranks it one ſtep lower than what are conſidered as rules for conſtruing and interpreting the intention of parties. That with ſuch a reſtricted conception of the power of the rule, he ſhould notwithſtanding

ſtanding liſten with an appearance of anxious attention to the diſcloſure of a comment like that of the preſent obſerver, which ſtates the rule to be quite *imperative* to intention, was at leaſt a great ſtretch of politeneſs to one, who in ſtation, years, and every poſſible point of view, ſtood at ſuch a diſtance from him; ſo great indeed, that if it was nothing more, it may be well deemed an exceſs in a point, which in the preſent obſerver's mind is not eaſily exceeded.—Further, it operates as a great encouragement to the preſent obſerver's riſquing the publication of his notions about the rule in queſtion, that ſubſtantially they appear in great meaſure to accord with thoſe attributed to a living judge of equity of the firſt rank and deſcription. At leaſt it may be collected from the printed report of his judgment in the great cauſe of Jones and Morgan (*a*) in its latter ſtage, that his general impreſſions of the rule are not unſimilar to thoſe, which it is here the intention to ſtate and inſiſt upon in a full and particular manner. If this remark be well founded, it may of itſelf ſuffice to prevent a deſertion of the preſent attempt.—But it is due to the diſtinguiſhed perſons, with whom the preſent obſerver as he conceives eſſentially differs, to acknowledge, that even in them he finds reſource for inſpiring him with confidence in the avowal of his ſentiments. It is the concomitant of low and ill-inſtructed minds to deſpiſe every thing, which either comes from perſons with inferior pretenſions, or claſhes with their own pre-conceived notions. But there is uſually a liberality incident to elevated

(*a*) The equity branch of this cauſe is reported in a volume of recent caſes in chancery, for which the profeſſion of the law is indebted to William Brown, Eſq; It is to be hoped, that this reſpectable gentleman will perſevere, in his very laudable endeavours to give a communication of deciſions in chancery with all poſſible earlineſs after their delivery; and that thoſe endeavours will be aſſiſted by an encouragement from all profeſſional perſons, adequate to the effectual ſupport of his preſent plan of a regular periodical publication. In this latter mode of publiſhing reports, he was preceded by two gentlemen of the bar, who have lately commenced an undertaking to publiſh the deciſions in the king's bench, within a ſhort period after each term: in which arduous attempt they have hitherto acquitted themſelves ſo as to command applauſe. But ſtill there are wanting reporters upon the like plan for the courts of common-pleas and exchequer. It may, however, be reaſonably expected, that this chaſm in the reſponſes from our juridical oracles will not much longer remain unſupplied. At leaſt it will be remarkable, if amongſt all the learned advocates continually attendant upon theſe two latter courts, none ſhould be found, having enough of leiſure from practice, and of zeal for profeſſional inſtruction, to influence them into an enterprize of ſuch apparent public utility.—Should a quick, regular, and authentick publication of the deciſions of the four great courts in Weſtminſter-hall, ſuch as is here pointed at, be once permanently eſtabliſhed; this, with occaſional aids from accompliſhed reporters like Mr. Douglas, would enſure a continual and almoſt immediate communication, not only between one of theſe courts and another, but between all of them and the whole profeſſion of practiſing lawyers throughout the kingdom. In conſequence alſo of this rapid and extending circulation of legal and equitable learning, the claſhing diſcordancy of deciſion, otherwiſe unavoidable, might be in a great meaſure obviated. Thus the plan of regularly periodical reports, being ably and ſteadily purſued, might materially contribute to enlightening the reſpective ſyſtems of law and equity, and conſequently to preſerving them upon the ſolid foundations of diſtinctneſs, certainty, and uniformity:—a conſummation, which would neceſſarily contract the ſphere of long and expenſive litigation, by ſuppreſſing ſome of its moſt fruitful ſources.

and highly cultivated minds, which almoſt ever diſpoſes them to give a generous ſhelter to well-intentioned inveſtigations of ſcientific ſubjects, however perſonally unimportant the adventurer in them may be. It alſo belongs to perſons with ſuch minds, not to forget the wondrous fallibility of the human underſtanding, or to be unconſcious, that even in its higheſt perfection it ſometimes falls into errors, which are eſcaped by an ordinary capacity; and thence it is, that they are ſo often found to riſe above that obſtinate prejudice in favour of their own opinions, which ſhuts the ear againſt all reaſoning to the contrary.

Having prefaced ſo much to engage the favour and indulgence of his readers, the preſent obſerver will now proceed to detail, what are the innovations he had to complain of; what are the grounds upon which he preſumes to call into queſtion the modern doctrine upon the rule in Shelley's caſe; what are the points of that doctrine, which alarm him as having a tendency to ſubvert the rule, and to produce an embarraſſing uncertainty; and what is the favourite conſtruction, which he would enforce, to ſimplify and fix the application of the rule, and to reſcue it from all future ambiguity.

The whole grievance, which it is here intended to point out and remove, if it really exiſts, has inſenſibly grown amongſt the expounders and debaters on the rule in Shelley's caſe, from conſidering it with too much and too indulgent a reference to the views and *intentions* of teſtators and other authors of entails.

When it is collected, how frequently the rule muſt neceſſarily croſs and interrupt one object almoſt ever in view on the entail of eſtates, it may be eaſily accounted for, that the controverſy ſhould have taken a turn ſo connected with intention. In the caſes in which the queſtion ariſes, whether the rule ſhall govern or not, it almoſt ever occurs, that the author of the entail doth not mean, that the tenant for life, to the heirs of whoſe body the remainder is limited, ſhould have power to defeat the ſucceſſion to them by an alienation to their prejudice. Anxiouſly and formaly to aim at creating a ſtrict entail, and at the ſame time to intend that the firſt taker of the eſtate ſhall be competent to deſtroy it at his pleaſure, is an inconſiſtency too improbable to be juſtly imputed. But hence a ſort of oppoſition neceſſarily ariſes between the rule in Shelley's caſe and the intention of the party entailing: for if the rule is applied, it immediately gives to the tenant for life the opportunity of diſappointing the ſucceſſion eſtabliſhed in favour of his heirs; whereas if the rule is not applied, the ſucceſſion is invulnerable by him. The rule and the intention then drawing in theſe oppoſite directions, it naturally cauſed a temptation to avoid the former in ſuch caſes to the utmoſt, for the ſake of accompliſhing the latter as far as our policy againſt the perpetuity of entails will allow. This

The explanation, it is apprehended, exhibits the true ſource and ſpring of the controverſy in queſtion, the real origin of all the numerous contentions about the force of the rule. If the rule and the intention accorded, there would be no room for heſitation about applying the rule. It is therefore from their clafhing only, that the conteſt could ariſe.

Accordingly ſome of thoſe, who ſeek to avoid the rule in Shelley's caſe, where if applied it would enable a tenant for life to diſappoint his poſterity of the proviſion intended for them, place their whole ſtrength of argument upon the apparent intention of the author of the entail, not to leave it in the choice of the tenant for life, whether his heirs or the heirs of his body ſhould ſucceed him in the poſſeſſion of the eſtate or not. Taking, therefore, intention for their grand principle of argument, they inſpect the will or other inſtrument creating the entail with an eagle's eye; and not a ſentence in the inſtrument, not ſo much as a ſingle word from which the leaſt ſpark of light to make clear the intention can be collected, eſcapes their active and ſedulous obſervation. Judiciouſly and ſkilfully too, in order to fix the mind on their favourite object, and prevent all wandering to any other conſideration, they aſſume it as a thing neither controverted nor controvertible, that the intention to give a power of alienating to the tenant for life muſt decide, whether the rule ſhall prevail or be rejected.

That the oppoſers of the rule ſhould take this courſe in their argument was natural, or rather unavoidable; for upon any other principle than intention to create ſuch a ſtrict entail, as ſhould defend the ſucceſſion againſt the tenant for life, invention itſelf would be at a loſs for matter wherewith to raiſe the leaſt doubt on the rule.

But it is not ſo eaſy to account for their falling into the ſame courſe of argument on the other ſide of the queſtion. One ſhould have thought, that the friends of the rule would have ſeen, that if the mere intention to prevent a tenant for life from having power over the entail was ſufficient to repel the rule, it would ſcarce be poſſible to ſuſtain its application in any of the conteſted caſes on the ſubject; for there is ſcarce one of them, in which a perſon unblinded by the frequency and miſt of diſputatious ſubtlety could fail ſeeing, that it was not the intent to inveſt the tenant for life with a power to defeat the ſucceſſion to his heirs. Even the ſingle circumſtance of giving an expreſs eſtate for life leads to a conjecture againſt ſuch an intent. But where the eſtate is given by words negativing a greater eſtate; as where a deviſe is to one *for life only*, or *for life and no longer*; or where powers of leaſing or jointuring are either given or refuſed to the tenant for life; or where he is reſtrained from committing waſte; ſurely it is more than conjecture, that the teſtator or donor did not

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mean to have the remainder to the heirs of the body of the tenant for life ſo conſtrued as to enable his ſelling or giving away the inheritance itſelf; it is ſurely moſt ſtrong and perſuaſive evidence. How much leſs then can it be convincing argued, that a tenant for life was intended to have ſuch a power to diſappoint his children and poſterity of the entailed property; when the author of the entail, in order to prevent ſuch effect and conſequence, interpoſes between the eſtate of the tenant for life and the remainder to the heirs of his body, an eſtate to truſtees to preſerve contingent remainders, of which the profeſſed and only object is to guard the ſucceſſion againſt all acts deſtructive of it by the tenant for life? To inſiſt, that even in ſuch a caſe there is not ſufficient evidence of an intention to deny to the tenant for life the power of breaking the entail and ſtripping his iſſue of the eſtate, ſeems to be ſuch an extreme, as can only originate from the ſuppoſition of deciſive judicial precedents, the ponderous weight of which from their number and reſpectability becomes abſolutely irreſiſtible, without breach of the reverence juſtly due to the ſtrong current of paſt deciſions. If alſo the rule really is under the controul of intention, how can it be reaſonably urged, that it ought not to prevail in caſes, in which the intention is confeſſedly diſappointed by applying the rule?

Had the friends of the rule in Shelley's caſe thus ſeen the arduouſneſs, if not the impracticability, of defending its operation on the ground of intention, they would ſcarce have conſented to put the rule to a teſt ſo hazardous. On the contrary, they would have explored for and ſtudied the principle of the rule, however deeply laid as one of the firſt foundations of our ſyſtem of property, till they had been able to draw forth for uſe the ſpirit and quality of the rule in its pureſt ſtate; and ſo could have evinced, that the intention of the framer of an entail to have the rule applied, was not the real and proper iſſue for trial between them and their opponents in the controverſy.

But unfortunately for thoſe, whoſe titles may become the ſubject of controverſy on the rule, ſome of its advocates either did not ſee the danger of ſo arguing upon it, or had ſo much confidence in the acknowledgment of its exiſtence and the ſeries of precedents againſt departing from its application, as to be at firſt careleſs in the mode of defence in other reſpects. This at leaſt may be probably inferred from their conduct; for by conſenting to argue the rule in ſome degree upon intention, they appear to have been gradually betrayed into a ſort of conceſſion, that, whether the author of the entail in queſtion meant to avoid the rule or to have it applied, was the true point to be conſidered.

That the controverſy has taken this turn amongſt ſome of the moſt diſtinguiſhed friends to the rule, it would be eaſy to prove

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by an abundance of paſſages from the arguments uſed in moſt of the great conteſted caſes ſince the judgment of the king's-bench in Coulſon and Coulſon, which caſe was decided as long ago as 1740. But to do this in a regular way, by collecting all the inſtances, would be a tireſome undertaking; and unleſs the aſſertion ſhall be denied, an unneceſſary one. Therefore it may perhaps be ſufficient to obſerve, that, in Mr. Juſtice Blackſtone's argument in Perrin and Blake, that late eminent judge moſt expreſsly avows treating the rule in Shelley's caſe as ſubſervient to the intention, where it appears with ſufficient explicitneſs; and, as has been already hinted at, pointedly ranks the rule in the ſecond claſs of thoſe flexible rules of law, which give way the moment they manifeſtly claſh with the intention of the party whoſe entail is the ſubject of diſcuſſion. There is indeed in one part of his argument a diſtinction taken by him, between an intent not to give a power of alienation, and an intent to negative the rule; and finally he admits the compleatneſs of the evidence of the former in the caſe of Perrin and Blake, but denies the ſufficiency of the latter. However, even upon this refinement the rule is made to be dependant upon intention, tho' not quite in the ſame form and degree, as it is made by other ſupporters of the rule; who appear to argue on intention more generally and indiſcriminately, as if it was a queſtion of intention, but one, in which on account of ſome peculiar ſacredneſs in the language of remainders to the heirs of the body or the heirs general of a tenant for life, nothing leſs than an expreſs negative ought to be deemed ſufficient evidence of an intent to uſe the words in a ſenſe different from the technical one

Thus the application of the famous rule in Shelley's caſe has been debated upon, until at length, even with ſome of its defenders, it is ſeemingly treated, as if it was left to the intention of parties to decide, what ſhall be a *deſcent* and what ſhall be a *purchaſe*; and as if the rule was a mere inſtrument to interpret, in favour of which of the two conſtructions the evidence of intent preponderates.

This brings forward the very point, which it is here propoſed to conſider; for it is this turn of the argument on the rule in Shelley's caſe, which, as the preſent obſerver has ever been ſtruck with the ſubject, is the cauſe of all the embarraſſment and ambiguity; and which, till it ſhall be entirely obviated, and the true quality of the rule ſhall be recalled into remembrance and its antient vigour ſhall be renovated, will continue to have that effect.

Here then is the proper place for pointedly and explicitly ſtating, wherein it is, that the preſent obſerver ſuppoſes his ideas of the rule to differ from thoſe which he deems ſo erroneous.

The general objection, which he makes to the current reasonings upon the rule, is, that on both sides of the controversy the rule is in danger of being sacrificed, by referring its application to the intention of the party, whose will or conveyance happens to be the subject of discussion. But the force of this general difference will be best understood, by a more particular contrast of his own notions with those he is encountering.

On the part of those who are studious to avoid the rule, it is avowed, that they consider the rule as wholly subordinate and subservient to the intention, as a rule of interpretation, a merely technical construction of words, which yields to the intention whenever they are opposed to each other. That the rule should be of this obedient nature, is the very essence of their argument. They first examine the will, or other instrument, to see whether a strict entail was intended or not, by referring, either to the positive and emphatic manner of giving an estate for life with its other circumstances, or to the still stronger evidence of an interposed estate to trustees to guard against any injury to the entail. Having clearly established, that it was meant by the remainder to the heirs of the body of the tenant for life, not to give him a power of barring the entail to those heirs, but on the contrary to restrain him from so doing, then they think, that the victory over the rule is complete; for they immediately add, that to make such strict entail, and so to restrain the tenant for life, was a lawful intention, and consequently ought not to be disappointed, by a harsh application of an old rule, the principle of which they consider as long expired and obsolete.

On the other hand some of those, who are against so easily dispensing with an application of the rule, seemingly give a countenance to the reasoning of their competitors, by insisting, that to depart from established rules of interpretation; to break in upon the established and appropriated sense of words so long used in settling and limiting the inheritance of real property, for the sake of humouring a testator's intention in avoidance of the construction prescribed in Shelley's case; and to set at defiance a series of the most authoritative decisions, which are the accumulation of ages; is levelling the great land-marks, by which the titles to real property are ascertained, and substituting in their room a monstrous latitude of arbitrary and uncertain construction. Even this stile of answering the attackers of the rule in Shelley's case is of a tendency, leading to a sort of implied admission, that if it was not for the technical and artificial sense of the words *heirs of the body* and *heirs*, and the accumulation of authorities and practice in favour of such established import, the rule in Shelley's case might yield to intention. But, as appears from the notice already taken of Mr. Justice Blackstone's argument in Perrin and Blake, it is not left to mere implication,

plication, that the defenders of the rule, or at leaſt ſome of them, conſider it as in a degree controulable by intention to avoid it; for ſo he expreſsly ſtates the rule to be.

But the preſent obſerver thinks, that he ſees ſomething to approve, and ſomething to condemn, in both of theſe diſcordant comments upon the rule: and that in both there is one common error, though not in the ſame proportion.

To the opponents of the rule, he admits, that where the rule would diſappoint the lawful intention ſufficiently expreſſed, it ought not to be applied. But then he aſks, *whether it is not a begging of the queſtion to aſſert, that the intention is lawful?* The rule, as he conſiders it, is a concluſion of law upon certain premiſes ſo abſolute, as not to leave any thing to intention, if thoſe premiſes really belong to the caſe; and thoſe premiſes, he inſiſts, are an intention by *heirs of the body*, or other words of inheritance, to comprehend the whole line of heirs to the tenant for life, and ſo to build a ſucceſſion upon his preceding eſtate of freehold. This being ſo, if in ſuch a caſe the word *heirs* is uſed in this its large and proper ſenſe, it is a contradiction of the rule to intend that the remainder to the heirs ſhall operate by purchaſe, and ſuch intent is not lawful. It therefore behoves thoſe, who wiſh to prevent the rule from applying, to ſhew, that the word *heirs* is not uſed in the large ſenſe, and to include a ſucceſſion, but is uſed in a peculiar and reſtrictive ſenſe, and intended merely to deſcribe certain perſons, who at the death of the tenant for life may anſwer to that deſcription; and, in the opinion of the now obſerver, nothing leſs can exempt the caſe from the rule; becauſe nothing leſs will prevent its being the very caſe, which the rule was made to govern. It is further conceded to the ſame perſons, that in conſtruing the inſtrument in queſtion, more eſpecially if it is a laſt will, the legally technical ſenſe of the uſual language in limiting the inheritance of eſtates, ſuch as a remainder to *heirs of the body* or to *heirs* generally, ought not to be adopted, where it is apparent from other paſſages or words in the ſame inſtrument, that it was the meaning of the party to apply the words in a different and more reſtrictive ſenſe. But then this conceſſion muſt be qualified, by adding to it, what is already expreſſed, that in the now obſerver's opinion nothing leſs than ſhewing, that by *heirs of the body* or *heirs general*, the whole line and ſucceſſion of heirs to the tenant for life, or in other words the whole of his inheritable blood, was not meant, which in Perrin and Blake and moſt of the conteſted caſes neither was nor could be pretended, can prove an intention to deviate from the legal ſenſe of the words.

With the defenders of the rule, he agrees, that the greateſt deference ought ever to be ſhewn to judicial precedents; that to

treat them with any thing like levity or captiousness, is of a most dangerous tendency; that the precedents in favour of the rule in Shelley's case are too antient, too numerous, too uniform, and too respectable, to be fairly resisted; that the rule ought to be as sacred now, as it was in the time of Lord Coke; and that to give up a particle of its authority, is indeed to remove antient landmarks, and will be a terrible shock both to present and future titles to property throughout the kingdom. Yet he concurs in these sentiments, not because the words *heirs of the body*, or rather technical words of inheritance used by conveyancers in wills and deeds, are more sacred, more stubborn, more inflexible, than other phrases having acquired a settled legal and appropriated sense; or because he construes the judicial decisions upon the rule, as bestowing a pre-eminence upon remainders to heirs after an estate for life over other forms of technical expression. Nor is he afraid of that liberal interpretation of the rule in Shelley's case, which professes to reject the technical sense of such remainders to heirs as are the object of its operation, when it clearly appears, that a testator applies the word *heirs* in a peculiar sense of his own. On the contrary he approves of such liberality, so long as it is confined within due bounds, and not confounded with that arbitrary discretion, which aims to submit every thing to the caprice of the judge for the time being. Nay, it is this very liberality, which, as he sees the subject, is best adapted to bring the rule in Shelley's case to the proper test: for, in his apprehension, it produces the true issue; namely, whether the party entailing means to build a succession of heirs on the estate of the tenant for life, and so to establish those premises on which only the rule proceeds. If such be the intent, then he would apply the rule, even tho' the party should express in his will, that the rule should not be applied, and that the remainder to the heirs of the tenant for life, should operate by PURCHASE; which strong sort of case has not yet occurred in a court of justice, though it certainly has been the subject of private consultation. This is the alternative into which the observer resolves every case arising upon the rule, whether by deed or will: because he doth not concur with Mr. Justice Blackstone and other supporters of the rule, in considering it as a mere rule of technical construction or interpretation, as a rule subservient and subordinate to the intention of parties, and therefore as flexible, accommodating, and obedient; and because he confidently believes, that the rule is a policy of law, which leaves nothing to intention, where the premises to which only it applies really exist; and consequently that it is of a quality rigid, stubborn, imperious, irresistible, and so indispensable as to be above all exception whatever.

Thus it appears that the now obſerver's notions do not altogether accord with thoſe of either ſide of the controverſy. With the enemies of the rule in Shelley's caſe, though he one moment yields to the liberality of conſtruction, which is the ſtrength of their argument: yet the next moment he claims to take from them all benefit of the conceſſion; by inſiſting, that this very liberality brings the only caſes, in which the conteſt is ſubſiſting, within the fulleſt meaning of the rule; and that this being ſo, not even an intent expreſſed by negative words can avoid it. With the friends of the rule, he exclaims againſt the leaſt encroachment upon it, and holds the leading caſes in which the difference ariſes, to be clearly governable by it: but at the ſame time he avows his fears, that they attribute lenient and yielding qualities to the rule, which once completely inſinuated into its conſtitution muſt finally produce its ſubverſion. In other words, whilſt he applauds the one ſide for being ſo liberal, he blames the other ſide for not being more rigorous. In exploring whether the premiſes, on which the rule proceeds, are exiſting or not, he is ſtudious to find out and to indulge the intention; but the moment the intention to eſtabliſh thoſe premiſes is diſcovered, he diſregards every other intention, and obdurately applies the rule, though ever ſo ſtrongly ſolicited to the contrary. He travels part of the way with the moſt inveterate adverſaries of the rule; but at the end of his journey he is forced to quit them, and ſo he arrives at the ſame concluſion with its moſt ſanguine friends. If he can prove, that his path is the right one, he hopes, not only to avoid offending either party, but to be an inſtrument in reconciling both: becauſe one party will ſee the cauſe of their enmity to the rule removed; and the other party will ſee their favour to the rule juſtified, and the rule itſelf made to appear even more ſacred than ſome of themſelves have repreſented it.

It now remains to explain, on what grounds it is thus aſſerted, that *at law* the rule is of that inflexible nature, which is before deſcribed; and that nothing leſs, than evidence of intending, by a remainder to the *heirs general* or *ſpecial* of a preceding tenant for life, not to include a ſucceſſion of heirs, but merely to deſign certain perſon or perſons anſwering to that deſcription at one particular inſtant of time, namely the death of the tenant for life, can ſuffice to exempt ſuch a remainder from the operation of the rule.

However, the ſubject having been ſo laboured, in opening what are apprehended to be the current errors upon the rule; and all the points of difference between the ſentiments of both parties to the controverſy in queſtion, having been ſo minutely contraſted, not only with each other, but with the ideas of the obſerver; it is expected by him, that he ſhall be able to com-

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preſs his further remarks, or at leaſt thoſe he means to make at preſent, within tolerably narrow bounds. From a preliminary explanation ſo extended, it may even be ſuppoſed, that the quick diſcernment of thoſe learned perſons, to whom he is ſubmitting his thoughts, will in great meaſure anticipate him in the ſubſequent part of the preſent undertaking. Indeed ſuch an anticipation may happen without any exerciſe of diſcernment; becauſe he has for many years made the rule a ſubject of private diſcourſe with many profeſſional gentlemen of eminence; and, as thoſe alluded to can teſtify, has ever laboured to impreſs ideas of the rule ſimilar to thoſe now publiſhed.

In order to juſtify his manner of conſidering the rule in Shelley's caſe, as before ſtated, the preſent obſerver will now proceed to conſider the *principle* of the rule more at large.

It is apprehended, that the genuine ſource of the rule in Shelley's caſe is an ancient policy of our law, the aim of which was to guard againſt the creation of eſtates of inheritance, with qualities incidents and reſtrictions foreign to their nature.

Some of the inſtances of this policy are perfectly familiar to lawyers, and ſo acknowledged, that the proof of them by authorities is needleſs.

Thus it is one of the properties of an eſtate in fee ſimple, that it may be alienated by the party ſeiſed; and this power, with ſome little exception, has been inſeparably incident to ſuch an eſtate ever ſince the ſtatute of *quia emptores terrarum* in the 18th of Edward the Firſt removed the ancient ſhackles of alienation. If therefore a gift or a deviſe is made to one and his heirs, with condition not to alien, the condition is void in law. On the eſtabliſhment of common recoveries in the reign of Edward the Fourth, it became an incident to an eſtate in fee tail, that the party ſeiſed of it ſhould have power to bar the entail, not only as againſt the iſſue in tail, but alſo as againſt all perſons in remainder or reverſion. By force alſo of ſtatutes made in the reign of Henry the Seventh and Henry the Eighth, tenants in tail gained a power of barring their own iſſue by a fine with proclamations, without reſorting to the more extenſive operation of a common recovery. Theſe incidental powers being thus annexed to eſtates in tail, it became a rule, that if an eſtate be given or deviſed to one and the heirs of his body, on condition not to bar the entail by a recovery or fine, the condition ſhall be reprobated and have no effect; which in the inſtance of the common recovery is the ſtronger, becauſe *that* originally, and before it's being ſanctioned by long practice and by ſtatutes to regulate it, was a fiction contrived in fraud of the law of entails as protected by the ſtatute *de donis*. Curteſy and dower are by

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appointment of law incidents to eſtates of inheritance, whether in fee ſimple or in fee tail. If therefore a gift or deviſe is made of ſuch eſtate with an expreſs declaration, that there ſhould be neither curteſy nor dower out of them, it would be a vain attempt to controul a quality, which is adherent to them by the bounty of the law in favour of huſbands and wives, and for the encouragement of matrimony.

It has not commonly occurred to thoſe engaged in the controverſy about the rule in Shelley's caſe, that theſe known examples of incidents inſeparable from eſtates of inheritance, if duly reflected upon, lead the mind into the diſcovery of a foundation for the rule, which in a moment renders it paramount to and independent of all private intention, and reduces the latter into a due ſubordination to the policy and proviſion of the law.

This aſſertion comes from the preſent obſerver, in conſequence of a firm perſuaſion, that the rule in Shelley's caſe is ſimply one branch of a policy of law adopted to prevent annexing to a real *deſcent* the qualities and properties of a *purchaſe*, and ſo is calculated to render impoſſible the creation of an *amphibious* ſpecies of inheritance: that is, an eſtate of freehold with a perpetual ſucceſſion to heirs without the other properties of an inheritance; in other words, an inheritance in the firſt anceſtor, with the privilege of veſting in his heirs by purchaſe; the ſucceſſion of heirs to an anceſtor without the legal effects of a deſcent; a compound of deſcent and purchaſe.

The reaſons againſt ſuffering *ſucceſſion* or *deſcent* to be ſtripped of its own proper incidents, and to be diſguiſed with the properties of a *purchaſe*, were many and cogent; and though ſome of thoſe reaſons have been impaired in their force, by the converſion of tenure by knight's ſervice into ſocage, and by other changes of our common law by ſtatutes, yet there ſtill remains fortification enough to reſiſt the evils, which might enſue, if the law ſhould endure the engraftment of *purchaſe* upon the ſtock of *deſcent*.

The tendency of a commixture of ſubjects, ſo oppoſite and diſcordant as *ſucceſſion* and *purchaſe*, to produce confuſion and diſorder in the ſyſtem of our law in reſpect to eſtates in land, and to deſtroy its admired diſcrimination of them, was of itſelf ſufficient to provoke the eſtabliſhment of barriers againſt the admiſſion of the novelty. Had it once gained reception, what would have become of all thoſe lines of diſtinction, by which we ſo eaſily and certainly diſcriminate inheritances from mere eſtates of freehold, and one ſpecies of both from another? Such a precedent once made for newly-fangled eſtates and intereſts in land, what would have become of all the numberleſs diſcriminations between the incidents, qualities, properties, and concomitants of one kind of eſtate, and thoſe of another? Muſt not the code of our law on the ſubject of eſtates in land have been expoſed to as many new tinctures and ſuperinductions, as the invention of every

every private adventurer in law-empiricism should from time to time have thought fit to incorporate? If the system had been left open to such continual invasions, the succinct though clear and comprehensive institution of the law of tenures by the venerable Littleton, and the copious and profound illustrations of his great commentator Lord Coke, with others of our antient and valuable depositaries of law, most probably would long before the present æra have ceased to be the faithful guides in this branch of English jurisprudence; and in place of the pure and certain system promulged in them, we should now be overwhelmed by one, which from its constitution would be ever acquiring new properties at the pleasure of every proprietor of land, and consequently be liable to a never-ceasing accumulation of novelty and uncertainty. The rules of our law in respect to titles to real property are necessarily open to frequent changes from legislative interposition and the variety of judicial interpretation; and these alone, from the weakness and fallibility of human wisdom, even in the aggregate exertion of it by parliament, and in the chastest exercise by the most enlightened judges, too often operate to the prejudice of our system. There wants not the aid of private and individual unskilfulness and caprice, either to encrease its fluctuation, or to distort its original simplicity.

It was another very important inducement to render impracticable the blending of the effects of *purchase* with the title by *succession*, that the consequence must have been a continual source of fraud upon feudal tenure. When the heir came in by *succession* or *descent*, and was under age, the lord of the fee was intitled to those grand fruits of military tenure, *wardship* and *marriage*. But if the heir took by *purchase*, only the trifling acknowledgment for a relief was due to the lord. It was, therefore, an object of the first magnitude in the consideration of feudal polity in England, not to leave it to the intention and choice of the tenant, what should be a descent, what a purchase: for that would have placed the most valued rights of the lord at the mercy of him, to the disadvantage of whose family they operated; and would therefore have been as absurd, as to have authorised the lord to make what he pleased a descent for the sake of augmenting his seignoral profits. Thus to enforce justice between lord and tenant, and to guard the former against fraud, the latter against oppression, it became essential to both, that the boundary between descent and purchase should be raised on a standard of discrimination wholly independant of and unalterable by either.

Nor were the rights of the feudal lord the only interests at stake in having the incidents to succession and descent preserved inviolate. Where the succession was to a fee simple, it was of

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conſequence to the ſpecialty creditors of the tenant, who died ſo ſeiſed, that his heir ſhould not have the benefit of the title by deſcent or ſucceſſion, and at the ſame time evade its diſadvantages under colour of taking as a purchaſer. So long, indeed, as the feudal reſtraints of alienation continued in full vigour, the tenant was diſabled from charging the land with his debts of any kind; and ſo long it was indifferent to his creditors, in what way the heir took the eſtate upon his anceſtor's death. But the reſtraints of alienation were broken through and in a great meaſure diſſolved in the reigns of our firſt and third Edwards: and thenceforward it became a juſtice due to the ſpecialty creditor, that the deſcent to the heir ſhould not operate with the qualities of a purchaſe. If on the anceſtor's death, the heir ſucceeded with the effect of deſcent, the land deſcended was aſſets to ſatisfy the demands of ſpecialty creditors: whereas if it had been allowed to the heir to ſucceed to the eſtate as a purchaſor, ſuch creditors would have been injured; it being clear, that land veſting by purchaſe was not aſſets, and therefore not liable to their demands. This difference to creditors between purchaſe and deſcent is notorious; and in conſequence of it, even a deviſe of land was not liable to his teſtator's ſpecialty debts, till the caſe was relieved by the third of William and Mary chap. 14. which corrected the hardſhip, by making *deviſees* chargeable for debts equally with heirs.

A third claſs of perſons intereſted againſt the permiſſion of legal ſucceſſion without the conſequences appropriated to it by law, conſiſted of perſons having rights of action for recovery of the inheritance of land. There is inherent in our ancient law a ſtrong averſion to having either the freehold or inheritance of land in a ſtate of *abeyance*. At this moment an abeyance of the freehold is not endured by our law for one moment, except in a few ſpecial caſes of extreme neceſſity, ſuch as during the vacancy of eccleſiaſtical benefices; and though it muſt be confeſſed, that the inheritance may be kept in abeyance, yet it ever was and ſtill is diſcouraged as far as it well can be without an entire prohibition. The reaſons of this odium to abeyance plainly are, that during a ſuſpenſion either of freehold or inheritance there is neceſſarily alſo a ſuſpenſion of various operations of law, more eſpecially of the ſeveral denominations of remedies for the recovery of land by real actions. Whilſt ſuch actions were the common modes of trying titles to real eſtate, it would have been a grievance of the moſt miſchievous tendency, if there had not been ſome rules of law to confine abeyance within due bounds. Even now, when the remedy by ejectment is become ſo enlarged and improved, as to be accommodated to the trial of moſt titles to land, caſes will ſometimes occur, in which, from loſs of the right of entry by lapſe of time and the ſtatutes of limitation, ſeri-

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ous inconveniencies may ariſe to ſuitors from an abeyance of the inheritance; as in ſuch inſtances, whilſt it continues, it may diſappoint claimants of the inheritance of the only remedies the law gives to enforce their rights. Had it, therefore, ever been allowed to diſannex from the title by ſucceſſion the qualities of a deſcent, by ſuffering heirs to come in by the title of heirſhip with all its privileges, and yet at the ſame time to ſhelter themſelves as purchaſors againſt all adverſe claimants of the inheritance of the land deſcended, the hardſhip of a temporary and occaſional ſuſpenſion of actions for the inheritance might have been gradually converted into the miſchief of a perpetual bar to the uſe of them. Mr. juſtice Blackſtone, in his argument in Perrin and Blake, adverts fully to ſome of the moſt ſtriking inconveniencies from abeyance; and thence ſeems to lay a particular ſtreſs on this odium of our law to it, as if it was the chief foundation of the rule in Shelley's caſe, and had been more conducive to its introduction, than any of the reaſons uſually aſſigned; in ſupport of which ſentiment, he more particularly appeals to a caſe in the year-book of the 18th of Edw. II. fol. 577. The preſent obſerver, indeed, is not at this time ſufficiently convinced to join in claſſing the miſchiefs from abeyance above all the other reaſons for the rule. But yet he concurs in thinking, that thoſe miſchiefs may well be ranked amongſt ſome of the chief reaſons for the policy againſt ſuffering heirs, who ſucceed as ſuch, to take as purchaſers.

It might alſo be a further reaſon for drawing the line between deſcent and purchaſe *imperatively*, that to have left it open to private intention to blend the effects of purchaſe with heirſhip, would have tended to breed confuſion in the law of ſucceſſion by which the deſcent of land is directed. Where the fee ſimple veſts in the heir by purchaſe, the heirs *ex parte paternâ* ſucceed *in infinitum* in preference to the heirs on the mother's ſide; but the former line of heirs failing, the latter line comes in; and till this alſo is exhauſted, the lord's title by eſcheat *propter defectum ſanguinis* cannot attach. Suppoſe then a feudal donation to have been anciently made to a woman and her heirs, with an expreſs intention of providing for her heirs lineal and collateral; but that, in order to avoid the lord's feudal perquiſites, the donor added, that the heirs of the woman ſhould ſucceed as purchaſers: ſuppoſe farther the donee to have died leaving only a ſon, and afterwards this ſon to have died without iſſue, and without having attempted any act to diſturb the ſucceſſion: in ſuch a caſe, it would have been clear, that one part of the donor's intention was to conſtitute a ſucceſſion in favour of the woman's family. Yet if the law would have ſuffered the donor's other intention of introducing her heirs by purchaſe to prevail, the conſequence

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would have been, not merely extending the ſucceſſion to a line of heirs foreign to the donor's views, but even preferring ſuch line *in infinitum* to that line, to which only the donor looked. That this would have been the reſult, will appear by conſidering that from the ſon's taking by purchaſe, *his* heirs would have taken inſtead of *his mother's*; that is, firſt his heirs on the father's ſide; and theſe ceaſing, then thoſe of the mother's. Thus by accompliſhing the unreaſonable inconſiſtency of a veſting by purchaſe, where the reality was a caſe of deſcent, the donor would have become the inſtrument of defeating his own plan of ſucceſſion almoſt as ſoon as it was eſtabliſhed, by the excluſion of that family of heirs, which only he had in view, till another family of heirs perfect ſtrangers to the object of his gift was wholly exhauſted; and ſo this, like moſt other improper gratifications, would have injured the very perſon it would have been meant to oblige. Nor doth this ſingle caſe ſhew nearly the full extent of the miſchiefs, which would have ariſen to the law of ſucceſſion from enduring a conjunction of the heterogeneous qualities of purchaſe and deſcent. The caſe ſuppoſed is only the inſtance of one ſtriking inconvenience. But had it been once allowed to veſt a fee ſimple in any perſon, and to give the effect of a purchaſe in reſpect of the firſt heir ſucceeding, it might have led gradually to an indulgence of the like ſort upon every deſcent, and then the ſucceſſion would have been ever taking a new courſe; becauſe every deſcent would have produced a new *terminus* from which the heirs were to be taken. By yielding alſo to ſuch a continual ſhifting of the ſucceſſion, the unity and order of our law of deſcents would have been fundamentally diſturbed; and one line of ſucceſſion would have been continually excluding another by a rotation, the principle of which ſeems neceſſarily generative of eternal change. Thus too in the place of our preſent certain and unerring rules of deſcent, ſuch an entanglement might at length have accumulated, as would have rendered the derivation of title by heirſhip a purſuit almoſt without end, and conſequently impracticable. The preſent obſerver will not ſtop to puſh this topic from the order of ſucceſſion any farther. But to him it ſeems probable, that much greater force might be given to the argument thence deducible, by a more profound ſtudy of this part of the ſubject; and by conſidering minutely, how each of our leading rules or canons of deſcent would be affected by the introduction of a new purchaſer on every deſcent, and by the conſequentially continued change of the *terminus*, or ſtock, from which ſucceſſion of heirs is to be taken.

From all theſe conſiderations it ſeems apparent, that if our law had ſuffered the qualities of purchaſe to be blended with thoſe of heirſhip, private intention would have broken down its moſt

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ſacred diſpoſitions and diſtinctions. Its policy againſt the invention of new kinds of eſtates in land, its policy to prevent frauds upon the lord and oppreſſion of the tenant, its policy in favour of ſpecialty creditors, its policy againſt abatement of the inheritance, its policy in the order of ſucceſſion; all the favourites of our law might have been ſucceſsfully invaded, had not ſome means been preſcribed to guard them againſt being at the mercy of the caprices of private intention.

If ſeeking for more aid did not appear ſuperfluous, theſe reaſons againſt receiving the real heir as a purchaſor might be variouſly amplified. If ſuch an inconſiſtency could have been tolerated, would it not alſo have followed, that private intention might have conſtituted fee ſimple without power of alienating, and fee tail without power to bar by fine and common recovery; with inheritances of each kind, without forfeiture for crimes, without curteſy for huſbands, without dower for wives, without the power of leaſing, without the privilege of committing waſte? To expreſs it more ſhortly, if private intention had been permitted to annex to real heirſhip the contradiction of veſting by purchaſe, what principle of our law would have remained to reſiſt ſtripping the title by ſucceſſion of all the other effects and conſequences legally appropriated to it?

Nay, even this is not the full extent of the argument againſt ſo yielding to private intention. If private intention might thus diſpoſſeſs inheritance of its legal properties and incidents, why might not an exertion of the like intention alſo ſeparate from eſtates for life and eſtates for years their eſſential peculiarities; and why might it not ſtrip an inheritance in fee, coming by *purchaſe*, of its courſe of ſucceſſion, and of its other properties, and in the place of them annex to it the privileges and appurtenances of *heirſhip*? In truth, from the nature of the principle againſt the combination of *purchaſe* with *deſcent* by the ſtretch of private intention, there crouds in upon the mind ſuch an eternity of objections, as demonſtrates, that the more the ſubject ſhall be inveſtigated, the higher the proof will riſe, that ſuch a combination could not be admitted to have force, without an almoſt univerſal ſubverſion of our legal ſuperſtructure in reſpect to the titles to real property.

It is upon this view of the innumerable obſtacles to confounding *deſcent* by accepting a real heir as *a purchaſor*, that the preſent obſerver has preſumed to aſſert,—that *purchaſe* and *deſcent* are concluſions of law upon certain premiſes, which are the eſſence of each:—that in the caſe of *deſcent* the premiſes are an eſtate of freehold in the anceſtor with a ſucceſſion to his heirs, either general or ſpecial:—that there is a principle inherent in our law, which in ſuch a caſe ever renders impoſſible the heir's taking otherwiſe than by deſcent, however ſtrongly and poſitively

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the author of the gift may expreſs an intention to have the heir accepted as a purchaſor :—and that intention will no more avail to give to the reality of a title by *deſcent* the effect of *purchaſe*, than it will to convert the reality of a title by *purchaſe* into the legal effect of a *deſcent*. Upon the very ſame grounds alſo the now obſerver ventures to advance as a further aſſertion, that the principles, which oppoſe the commixture of *purchaſe* with *deſcent*, are not *altogether expired and obſolete:* but that on the contrary they are *almoſt in the ſame ſtate of vigour as they anciently were.* The policy againſt indulging the creation of new kinds of inheritance, the policy againſt ſubverting the legal order of ſucceſſion, the policy againſt ſuffering the ſacred diſtinctions between deſcent and purchaſe to be violated, the policy againſt removing the great land-marks of the titles to real property, the policy againſt ſacrificing the moſt poſitive and imperative rules of our law to the caprice of private intention, and the policy againſt admitting a precedent of ſo contemning our ſyſtem in reſpect to the law of real eſtates; all theſe policies of our law are not leſs neceſſary to be *now* remembered and enforced, than they were centuries ago. There ought to be bulwarks to curb the encroaching and dangerous ſpirit of innovation *at all times.*

Here then the preſent obſerver begs leave to aſk, what are the barriers which our law places between *deſcent* and *purchaſe*, in order to guard againſt all encroachment of the latter upon the former? If the principle of our law againſt joining the effect of purchaſe with the reality of ſucceſſion be admitted, it muſt alſo be agreed, that our law muſt have provided ſome effectual impediment to prevent their incorporation. But unleſs the rule in Shelley's caſe is a part of that impediment, the preſent obſerver is at a loſs to know where a compleat barrier is to be found.

It is a poſitive rule of our law, that a man cannot raiſe a fee ſimple to his own right heirs as purchaſors, either by legal conveyance, by conveyance to uſes, or by deviſe (*a*). By this it is meant, that where the anceſtor by any ſort of conveyance appoints, that at his death his heirs ſhall by gift from him come to that very inheritance, which the law of deſcent or ſucceſſion throws upon the heirs at law, it is conſtrued as a vain and fruitleſs attempt to give that to the heirs, which the law itſelf veſts in them; it is ſpeaking what the law ſpeaks; and to give effect to ſuch a deſignation by every anceſtor, and ſo to enable him to convert the title to his heirs by deſcent into a purchaſe, might lead to a gradual undermining of the whole law of inheritance. Lord Hobart, in his report of the caſe of Counden and Clerke, deſcants learnedly upon this rule, and

(a) Hob. 32. Co. Lit. 22. b.

and proves its power in various instances. Now it is this very rule, which, as the now observer conceives, forms one of the barriers to guard descent to heirs from being made to operate by purchase. It amounts to a prohibition upon the ancestor against making his heirs purchasors, by giving at his death what the law confers without his aid; and puts an absolute negative upon all attempts to controul the law of succession in that respect.

But if our law had stopped here, its policy against blending the effect of purchase with descent would have been imperfectly guarded; for the last mentioned rule applies only to the acts of an ancestor as between him and his own heirs. It was therefore requisite to have a like barrier, as to acts between persons not standing towards each other in the relations of ancestor and heir. Otherwise upon every new gift or conveyance of an inheritance by its owner to a new proprietor, it might have been made part of the original terms of the donation, that it should be incident to the estate passed to the donee and his heirs, that his heirs should notwithstanding come in by purchase. It is for prevention of this latter evasion of the policy against confounding the law's distinction of descent with purchase, that the rule in Shelley's case was calculated. For what is the [illegible] amount of it? It is simply this, that no man shall raise in another an estate of inheritance, and at the same time make the heirs of that person purchasors. It gives the law to both kinds of inheritance equally; because the succession to *fee simple* and the succession to *fee tail* are *both* equally considered as titles by legal succession, that is, by descent: the difference being only, that the inheritance in fee existed before the statute *de donis*; and that the inheritance in tail was a modification of the former by that statute, in order in some degree to revive the antient favour to the perpetuity of entails, by substituting that new species of inheritance ever since called an *estate tail*, for the more feeble species of entail known in our law by the name of *fee conditional*. In thus equally guarding descents on fee simple and fee tail from the effect of purchase, the rule in Shelley's case only conforms to the consideration of them by our law in other respects; for it is certain, that the heir taking by succession in tail is construed to come in by operation of law and by descent, as well as the heir taking by succession in fee simple; and this similarity holds, not only as to the privileges of descent, such as *tolling of entry*, but also as to other consequences, so far as is consistent with the unalienable quality of an estate tail without the aid of fine or common recovery to bar it. In fact, the rule in Shelley's case is nothing more than a negative upon an *indirect* mode of introducing a real heir in the *assumed* form of a *purchasor*. If it had been attempted *directly* to make a *purchase* of a *descent*, by giving a fee simple,

ſimple, or fee tail, and then qualifying either eſtates by appointing that the heirs ſhould take by purchaſe; it would have been too rank a contradiction of our law to have had a chance of ſucceeding. The rule in Shelley's caſe was calculated to defend the law of deſcent againſt an *indirect* evaſion of its effects. Is it not the very eſſence of an eſtate of each ſpecies of inheritance, that it ſhould be enjoyed by the perſon ſeiſed of it for his life, with a benefit of a ſucceſſion at his death to his heirs general or ſpecial, according to the nature of the inheritance? Is not then the expreſſion, that the anceſtor ſhall have *for his life only*, with a ſucceſſion to his heirs at his death, a mere *nominal* difference from an eſtate to one and his heirs or the heirs of his body, except that it aims to qualify the inheritance, by refuſing powers of alienating, which the law has inſeparably annexed to ſuch eſtates? Is it not alſo the plain meaning of the rule to reſiſt the poſſibility of conſtituting a real eſtate of inheritance under this *ſhew* and *diſguiſe* of a leſſer eſtate?

Thus then at laſt it is diſcovered, that there is latent in the rule in Shelley's caſe, a principle, which conſtitutes it one of two great barriers or outworks provided by our law to guard *deſcent* from being confounded with *purchaſe*, and to obſtruct annexing to the eſſence of the former the diſcordant effect of the latter. In other words, the rule in Shelley's caſe, that *words of inheritance grafted upon a preceding eſtate for life ſhall operate by* LIMITATION *and not by* PURCHASE, with the rule, that *the anceſtor ſhall not raiſe a fee ſimple to his own right heirs*, is the grand fortification for defending our law of deſcents againſt all invaſion by private intention. *Singly*, each of theſe rules would have been an inadequate and incompleat defence; becauſe each protects only one half of the citadel. Operating *conjunctively*, they ſo guard the policy of deſcent in all its eſſential branches, as to make it unaſſailable at all points. Whilſt, therefore, theſe bulwarks are ſteadily maintained, our law of inheritance and deſcent may remain inviolate. But ſhould theſe main parts of the fortreſs be once undermined or ſurrendered, who can ſay, that the ſubordinate and inferior defences will ſuffice for its protection?

If this be a true developement of the principle of the rule in Shelley's caſe, all pretence for any longer arguing upon it, as a mere technical rule of interpretation, as a mere artificial mode of conſtruing the intention of a will or other conveyance, muſt henceforth wholly vaniſh, and the rule will re-aſſume its original rank and importance. Inſtead of being ever again miſtaken as a rule for ſpelling out and executing private intention, it will be henceforward recognized as a check to reſtrain private intention from levelling the diſtinction of inheritance. The diſguiſe of the

the rule by modern gloſſes being thrown off, its true features break forth and are fully ſeen; and from being diſhonoured as a *ſervant* and *ſlave* to *private intention*, the latter muſt ſhrink from its vain pretenſion to ſuperiority, and acknowledge the rule to be its *abſolute lord and maſter*. Firm and immoveable in its claim of ſole empire, and looking down on private intention as its lawful ſubject, the rule will neither give nor accept any terms of capitulation. It proudly diſdains all compromiſe of differences; all participation of power. Here, if the rule could ſpeak for itſelf, it would ſtrongly exclaim to private intention, AUT CÆSAR AUT NULLUS.

If too, this deduction be agreeable to the real origin and nature of the rule in Shelley's caſe, what becomes of all the reaſoning from intention? Thus explained, the rule in Shelley's caſe can no longer be treated as a *medium*, either for finding out intention, or for aſſiſting to execute it. On the contrary the rule ſuppoſes the intention already diſcovered, and to be, that the gift or conveyance in queſtion has firſt given to ſome perſon an eſtate of freehold, and then ſuperadded a ſucceſſion to the heirs general or ſpecial of that ſame perſon, by making him or her the anceſtor, *terminus*, or *ſtirps*, by reference to which the whole generation and poſterity of heirs is to be accounted. Whether the conveyance has or has not ſo conſtituted an eſtate of freehold with a ſucceſſion engrafted upon it, is a *previous* queſtion, which ought to be adjuſted, before the rule is thought of. To reſolve that point is not the office of the rule in Shelley's caſe; nor from its nature can it contribute any aſſiſtance whatever. Therefore the ordinary rules, for interpreting the language of wills and other conveyances, ſhould be reſorted to; and then by appealed to, it will appear, that there is no more of objection to a reaſonably liberal allowance for imperfect, inaccurate, and inartificial language, in the caſe of a gift or deviſe to one for life with remainder to heirs of the body or heirs, than there is in other caſes, where the ſenſe of technical phraſeology is to be determined upon. Surely the rules of interpreting words muſt be the ſame throughout. If a ſingle word or a whole ſentence has by habit obtained an appropriate ſenſe, the law ought to preſume in favour of that ſenſe in preference to any other; unleſs from other paſſages in the ſame inſtrument, or from ſome peculiar circumſtances attending the caſe, there is evidence ſufficient to ſatisfy the mind of the judge, that the author of the inſtrument under conſideration really intended to convey a different meaning. For the ſake of preventing the aſſumption of a boundleſs and arbitrary diſcretion, it is fit, that great reſpect ſhould be ſhewn to former deciſions as to the weight of evidence requiſite to repel the legal or technical ſenſe of words. But ſome diſcretion muſt neceſſarily be left; becauſe to inſiſt

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that men shall only use words in one certain sense would be a monstrous tyranny; and there is such an infinite variety in the language and circumstances which may occur to distinguish one case from another, that, to lay down one general rule of interpretation so absolute as to be indispensable, would be making legal interpretation to torture like the bed of the fabulous Attic robber Procrustes, and so every instrument would be cruelly stretched or curtailed into the same meaning. All this plain sense as to the interpretation of words is, and more or less ever has been, the language of our judges in deciding upon conveyances and written instruments of every kind, with however a peculiar extension of indulgence to last wills and testaments. But the process of benignant interpretation is no part of the rule in Shelley's case. What the donor or testator means by *heirs*, or *heirs*, or *heirs-male of the body*, or *issue*, should be first adjusted, without the least reference to or thought of the rule. Till that meaning shall be settled, it is uncertain, whether the rule in Shelley's case may not be quite a foreign consideration.—When, indeed, it is once settled, that the donor or testator has used words of inheritance according to their legal import; has applied them intentionally to comprize the whole line of heirs to the tenant for life; has really made him the *terminus* or ancestor, by reference to whom the succession is to be regulated; then too it will appear, that being considered according to those views of policy, from which it originated, it is perfectly immaterial whether the testator meant to avoid the rule or not; and that to apply it and to declare the words of inheritance to be words of *limitation*, to be words vesting an inheritance in the tenant for life, and to be words vesting a remainder in fee or in tail in him as the ancestor and *terminus* to the heirs, is a mere matter of course. There is however a distinction to be remembered with respect to the manner of the rule's operating. If such inheritance in remainder be *immediate* to the estate for life, it will merge therein, and constitute one entire inheritance in possession. It is also as clear, that if such remainder be only *mediate*; that is, if, between the estate for life and the remainder to the heirs general or special, there be interposed an estate of freehold, whether *expressly* to preserve contingent remainders, as in *Coulson* and *Coulson*, or *impliedly*, as in *Perrin* and *Blake*, or an estate either of freehold or inheritance for any persons beneficially or otherwise; in all these cases, the estate of the tenant for life is prevented from consolidating with the remainder to his heirs, and consequently he has an estate for life with a vested but unmerged remainder in tail or in fee, according to the kind of heirs described. But between these two modes of operation, there is more of name and form

than of reality and ſubſtance: for, according to both, the tenant gains the ſame power over the inheritance, and of defeating the entail, if there be one.—On the other hand, if it ſhall be decided, that the teſtator or donor did not mean, by the words of inheritance after the eſtate for life, to uſe ſuch words in their full and proper ſenſe; did not mean to involve the whole line of heirs to the tenant for life, and to include the whole of his inheritable blood; did not mean to engraft a ſucceſſion on his preceding eſtate, and to make him the anceſtor or *terminus* for the heirs: but, inſtead of this, intended to uſe the word *heirs* in a limited, reſtrictive, and untechnical ſenſe; intended to point at ſuch individual perſon, as ſhould be the heir, or heir of the body, of the tenant for life at the moment of his deceaſe; intended to give a diſtinct eſtate of freehold to ſuch ſingle heir, and to make his or her eſtate of freehold the ground-work for a ſucceſſion of heirs to conſtitute him or her the anceſtor *terminus* and ſtock for the ſucceſſion to take its courſe from: in every one of theſe caſes, the premiſes are wanting, upon which only the rule in Shelley's caſe interpoſes its authority; it is clearly a caſe, in which the remainder to the heirs of the tenant for life, having the premiſes belonging to a *purchaſe*, cannot enure by *limitation* or *deſcent*; and thus the rule in Shelley's caſe becomes quite extraneous matter.

Here then a ſtill further advance is made with the preſent ſubject.—From the preceding conſiderations it was to be collected, that the principle of the rule in Shelley's caſe was incapable of bending to intention; that it was a rule of *public policy*; and that it muſt ceaſe to exiſt, when *private intention* ſhall ceaſe to be governed by it.—But in this laſt view of the rule, it is ſhewn to be no leſs facile, certain, and invariable in its application, than it is abſolute in its power. When the reaſons and principles upon which the rule became incorporated into our complex though juſtly admired ſyſtem of law about real property, are enquired after; when the title to the empire the rule claims is inveſtigated; the depth, remoteneſs and antiquity of its foundations muſt unavoidably cauſe ſome trouble, ſome exertion of mind, to the moſt diſcerning and profound of modern lawyers. The primary ſources of great navigable rivers are ſeldom to be traced without a long laborious and painful reſearch. But the power of the rule being once proved and admitted, the moſt juvenile and ſuperficial of lawyers may in general without the leaſt difficulty know, when and how that power ought to be exerted: for the winding up of a watch is ſcarce a more quick and facile operation. The previous enquiry is ſurely of all juridical queſtions the moſt ſimple, being, as before appears, nothing more than whether, by a remainder to the *heirs*, either general or ſpecial, of a preced-

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ing tenant for life, it is the meaning of the inſtrument to include the *whole of his inheritable blood*, the *whole line of his heirs*; or to deſign only *certain individual perſons anſwering to the deſcription of heirs at his death*. If the former is the ſenſe, the rule *always* applies; and by *veſting* the remainder in the tenant for life forces it to operate by *limitation*, even though the inſtrument ſhould contradictorily and inconſiſtently add in expreſs terms, that the remainder ſhall operate as a *contingent* one, and enure ſo as to make the *heirs purchaſors*. If the latter ſenſe is adopted, the rule is as invariably foreign to the caſe; and the remainder conſequently is *contingent* till the death of the tenant for life, upon which event his heir takes it by *purchaſe*. This being ſo, the whole doctrine is reſolved into ſo ſmall a compaſs, that it ſeems wonderful, how even the frequency of the moſt ſubtle diſputation, or the exertions of the moſt profound juridical learning, could raiſe miſt enough to render ſuch a ſubject abſtruſe, obſcure, and entangled. Conſidered then in this plain manner, and being thus reſtored to its original ſimplicity, the rule will again ſhine forth with full and conſtant luſtre, and ſo will again faithfully and perpetually ſerve as an unerring guide to judges and lawyers. But if it ſhall be left in that ſtate of dimneſs, which it is the deſign of theſe obſervations to diſſipate, the rule muſt ever cauſe trouble and perplexity to the underſtandings of all lines of the profeſſion. If the preſent obſerver's idea of the rule is well founded, the doctrine upon it will be ſo ſhortened and ſimplified, that a moment's conſideration will ſuffice to decide almoſt upon every caſe which is propoſed; and it can rarely happen, that the leaſt reference to any books ſhould be neceſſary. But if his idea ſhall be rejected, then, as his mind feels the ſubject, the learning of the rule muſt ſtill be hunted for through volumes of reports, the bulk of which from a continuance of the cauſe will be ever on the increaſe; and thus the rule muſt ſtill ſubmit to the reproach of being a ſpecies of profeſſional myſtery. Upon the whole, therefore, ſo far as the principle of the rule is concerned, it ſeems warrantable to aſſert, that the rule, being taken in its natural, ſimple and undiſguiſed ſtate, will ſcarce leave room for any contention whatever; but that being received with its artificial ſuperinductions, it muſt continue to be the fruitful ſource of litigations without number.

It now remains to examine how far the turn and import of the decided caſes, and of the other authorities both at law and in equity, accord with the preceding expoſition of the rule in Shelley's caſe. It may alſo be proper to conſider various objections, which are likely to be made to the preſent obſerver's manner of

explaining the rule; more eſpecially the objection, which may be raiſed from the liberty taken with the rule in our courts of *equity*, when they are deciding upon *equitable* entails.—Both of theſe enquiries are ſo eſſential to the full inveſtigation of the true doctrine in reſpect to the rule in Shelley's caſe, that without them the mind cannot receive compleat ſatisfaction.

But *here* the preſent obſerver cannot forbear making a *pauſe*. —Hitherto he has proceeded with his ſubject in terms of conſiderable freedom, and in a ſtile ſo ſtrong, as to be excuſable by nothing leſs than a confidence inſpired by the generous candor of the ſuperior perſons to whom he is addreſſing himſelf. Yet great and liberal as that candor is, he begins to heſitate about trying it further. Nay, on a review of the lengths into which a ſenſe of it has already carried him, he almoſt doubts, whether he ought not to ſuppreſs what has now eſcaped from his pen. He is not ſure, but that he may be told, that from his exuberance of zeal for the rule in Shelley's caſe he has been betrayed into a perfect deluſion; and that the doubts and difficulties, which diſturb his mind, have not the leaſt exiſtence elſewhere. If there is the leaſt ground for apprehending that this ſhould be the language towards him, he ſtands already too much committed. With ſuch an alarm of danger upon his mind, however ſuddenly it may have come, it would be extreme indiſcretion to hazard himſelf ſtill further, without firſt waiting to inſpect more thoroughly the ground upon which he ſtands. In the opinion of the preſent obſerver, all controverſial writing, more particularly on the very ſerious and ſolemn topics of law, unleſs it be to effectuate ſome real and ſubſtantial good, is an indefenſible employment of time. It behoves him then to have eſpecial care, how he takes any ſhare in an *ideal* controverſy. Had not this uſeful check occurred to him ſo recently, that he could not with decency retreat from the whole of his original intention, even this firſt part of his obſervations upon the doctrine in queſtion would probably have been ſpared. As his mind now feels affected, there is not much probability of his adventuring himſelf further on a ſubject, which to his coſt perhaps he may find of too extreme a delicacy to be touched by one of his humble deſcription. When he began theſe obſervations, his ſpirits were raiſed by the hopes of contributing his mite towards the final elucidation of an important ſubject, and of ſo intitling himſelf to a ſmall portion of indulgent praiſe from the learned profeſſion to which he belongs. But he now fears, that there is danger of having his preſent labours conſidered as an officious interpoſition of himſelf, where no ſuch inferior aſſiſtance was either deſired or wanted.

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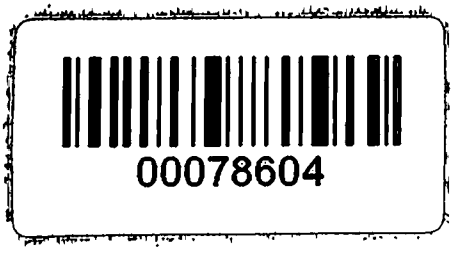
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